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Northwestern University School of Law

THE FEDERAL REPORTER.

VOL. 10.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

FEBRUARY—APRIL, 1882.

ROBERT DESTY, EDITOR.

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CASES REPORTED.

	Page		Page
Adams v. Meyrose.....	671	Carao v. Guimaraes.....	783
Adams, Hostetter v.....	838	Cargo of Malt, A.....	774
Alabama, The.....	394	Carrier v. Town of Shawangunk....	220
Alden, Star Salt Caster Co. v.....	555	Cary, In re.....	622
Aldrich v. Crouch.....	305	Case v. Small.....	722
Allen & Co. v. Thompson.....	116	Cavender v. Cavender.....	828
American Grape Sugar Co., New		Cavender, Cavender v.....	828
York Grape Sugar Co. v.....	835	Celluloid Manuf'g Co., Spill v.....	290
American Oleograph Co., Kerting v.	17	Centennial, The.....	397
Anderson v. Shaffer.....	266	Central Nat. Bank, United States v.	612
Ant, The.....	294	Chicago, M. & St. P. R. R., Greg-	
Apgar v. Christophers.....	857	ory v.....	529
Arthur, White v.....	80	Chicago, M. & St. P. R. R., Harris v.	529
Artt, Osgood v.....	865	Chicago, M. & St. P. R. R., Meighen	
Atchison, T. & S. Fe R. Co., Dins-		v.....	529
more v.....	210	Chicago, M. & St. P. Ry. Co. v.	
Atlantic & O. R. Co., Karns v.....	309	Sioux City & St. P. R. Co.....	435
Atwood v. The Portland Co.....	283	Christophers, Apgar v.....	857
Baltz, New Process Fermentation		Chung Yune v. Shurtleff.....	239
Co. v.....	289	Cissell v. Pulaski County.....	891
Baltzer, Bischoffsheim v.....	1	Citizens' Ins. Co. v. Kountz Line...	768
Barber v. Hallett.....	130	City of Salem, The.....	843, 847
Bartow, United States v.....	873, 874	City of St. Louis, Rutz v.....	338
Bates v. United States.....	92	Clark, Bookwalter v.....	793
Bellew, Hubbard v.....	849	Compagnie Generale Transatlan-	
Benedict v. Williams.....	208	tique, People of the State of New	
Bigelow Carpet Co. v. Dobson.....	385	York v.....	357
Bischoffsheim v. Baltzer.....	1	Converse, Vermont Farm Machine	
Blue Bonnet, The.....	150	Co. v.....	825
Boyd v. Bradish.....	406	Conway County, Goldman v.....	888
Boynton Bros., In re.....	277	Cope v. Vallette Dry-dock.....	142
Boynton, Jesse, In re.....	277	Copes, Gaylord v.....	827
Boynton, Lyman, In re.....	277	Crane v. Waters.....	619
Bookwalter v. Clark.....	793	Crittenden, Kallston v.....	254
Boone v. Iowa & Minn. Const. Co..	401	Crouch, Aldrich v.....	305
Bradish, Boyd v.....	406	Culliford & Clark, Maury & Co. v..	388
Brett v. Quintard.....	741	Cusimano, Lindsay, Gracie & Co. v..	302
Bruce v. Marder.....	750	Cuykendall v. Miles.....	342
Buerk v. Imhaeuser.....	608	Denver & R. G. R. Co., Dinsmore v.	210
Buford & Co. v. Strother & Conklin.	406	De Smet, The.....	483
Buntin, United States v.....	730	De Visser, United States v.....	642
Burgess v. Graffam.....	216	Dickinson v. Worthington.....	860
Campbell, United States v.....	816	Dinsmore v. Atchison, T. & S. Fe R.	
		Co.....	210

	Page		Page
Dinsmore v. Denver & R. G. R. Co.	210	Heath, White v.	291
Dinsmore v. Missouri, K. & T. Ry. Co.	210	Henderson, In re.	385
D. M. Anthony, The.	760	Henry Chapel, The.	777
Dobson, Bigelow Carpet Co. v.	385	Henry v. Gold Park Mining Co.	11
Dobson, Hartford Carpet Co. v.	385	Hess, Harris v.	263
Doxford, The.	683	Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.	596
Doyle v. United States.	269	Hinsdale-Doyle Granite Co. v. Tilley.	799
Duncan v. Greenwalt.	800	Hitchcock, Lewis v.	4
Dunn, Young v.	717	Hostetter v. Adams.	838
Ebbs, United States v.	369	Howe Machine Co., Wooster v.	666
Ehret v. Pierce.	553	Hubbard v. Bellew.	849
Ellis, Marion v.	410	Huntington, Providence Savings Bank v., (two cases,)	871
Evans v. Faxon.	312	Imhaeuser, Buerk v.	608
Faulks v. Kamp.	675	Indianapolis & St. L. R. Co., Keep v.	454
Faxon, Evans v.	312	Iowa & Minn. Const. Co., Boone v.	401
First Nat. Bank of Kittanning, Lin- ton v.	894	Iowa & Minn. Const. Co., In re.	401
Fish, Paddock v.	125	Irish, Van Hoven v.	13
Fisher v. Meyer.	268	Irvine, McKay v.	725
Flagg v. Manhattan Ry. Co.	413	Irzo v. Perkins.	779
Gaylord v. Copes.	827	Jacobs v. Ousatonic Water Co.	826
Garrett, Hammerschlag v.	479	J. B. Camors & Co., Watts v.	145
Gauche v. London & Lancashire Ins. Co.	347	Jennings v. Kibbe.	669
Glamara, The.	678	John Dere & Co. v. Strother & E. Conklin.	406
Goldman v. Conway County.	888	Jones, United States v.	469
Gold Park Mining Co., Henry v.	11	Justices of Lauderdale County, United States ex rel. Watts v.	460
Gottfried v. Miller.	471	Kamp, Faulks v.	675
Graffam, Burgess v.	216	Karns v. Atlantic & Ohio R. Co.	309
Grand Republic, The.	398	Keep v. Indianapolis & St. L. R. Co.	454
Gravelle v. Minneapolis & St. L. Ry. Co.	711	Keep v. Union Railway & Transit Co.	454
Gregory v. Chicago, M. & St. P. R. R.	529	Kensett v. Stivers.	517
Greene v. Klinger, (three cases,)	689	Kershaw v. Town of Hancock.	541
Greenwalt v. Tucker.	884	Kerting v. American Oleograph Co.	17
Greenwalt, Duncan v.	800	Keyes, United States v.	876
Guimaraes, Carao v.	783	Kibbe, Jennings v.	669
Guiteau's Case.	161	Klinger, Greene v., (three cases,)	689
Gunther v. Liverpool, London & Globe Ins. Co.	830	Kountz Line, Citizens' Ins. Co. v.	768
		Krum, United States v.	823
Hallett, Barber v.	130	Lanning v. Lockett.	451
Hammerschlag v. Garrett.	479	Lebanon Manuf'g Co., Mengis v.	665
Hammond v. Olmstead Bros.	223	Lee, Ryan v.	917
Hammond, Torrens v.	900	Leipsic, The.	585
Hannon v. Sommer.	601	Leversons, The.	753
Harden, United States v.	802	Lewis v. Hitchcock.	4
Hardy v. Marble.	752	Liegeois v. McCracken.	664
Harris v. Chicago, M. & St. P. R. R.	529	Life Ass'n of America, Rundel v.	720
Harris v. Hess.	263	Lindsay v. Stein.	907
Harrison, Third Nat. Bank v., (two cases,)	243	Lindsay, Grace & Co. v. Cusimano.	302
Hartford Carpet Co. v. Dobson.	385	Linton v. First Nat. Bank of Kitan- ning.	894
Hartford, P. & F. R. Co., Mason v.	334	Liverpool, London & Globe Ins. Co., Gunther v.	830
Hart v. Thayer.	746	Lockett, Lanning v.	451
Harvey v. Lord.	236	London & Lancashire Ins. Co., Gauche v.	347
H. C. Yaeger Transp. Co., The, Memphis & St. Louis Packet Co. v.	395		

	Page		Page
Long, United States v.....	879	Northwestern Masonic Aid Ass'n,	
Lord Clive, The.....	135	Worley v.....	227
Lord, Harvey v.....	236	Nunez, Mora v.....	634
Lovell, Schneider v.....	666		
Macdonald v. Shepard.....	919	Odeneal, United States v.....	616
Maddock, Stockton v.....	132	O'Fallon, Moore v.....	593
Manhattan Ry. Co., Flagg v.....	413	Olmstead Bros., Hammond v.....	223
Marble, Hardy v.....	752	Olney v. Tanner.....	101
Marder, Bruce v.....	750	Osgood v. Artt.....	365
Marion v. Ellis.....	410	Ousatonic Water Co., Jacobs v.....	826
Marion County v. McIntyre.....	543	Overton v. Memphis & L. R. R. Co..	866
Mary Stewart, The.....	137		
Mason v. Hartford, P. & F. R. Co..	334	Paddock v. Fish.....	125
Matthews v. Puffer.....	606	Paul Revere, The.....	156
Matthews, Platt v.....	280	People of the State of New York v.	
Matthews, Tufts v.....	609	Compagnie Generale Transatlan-	
Maury & Co. v. Culliford & Clark..	388	tique.....	357
Mayor, etc., of the City of New		Perkins, Irzo v.....	779
York, The, Miller v.....	513	Philadelphia Warehouse Co., Sharp v.	379
McCall v. Town of Hancock.....	8	Phillips Lubricator Co., Seibert Cyl-	
McCracken, Liegeois v.....	664	inder Oil Cup Co.....	677
McIntyre v. Thompson.....	531	Pierce, Ehret v.....	553
McIntyre, Marion County v.....	543	Platt v. Matthews.....	280
McKay v. Irvine.....	725	Portland Co., The, Atwood v.....	283
Meighen v. Chicago, M. & St. P. R.		Portland & O. R. Co., Mercantile	
R.....	529	Trust Co. v.....	604
Memphis & L. R. R. Co., Overton v.	866	Posey v. Scoville.....	140
Memphis & L. R. R. Co., Southern		Preston v. Walsh.....	315
Express Co. v.....	210	Providence Savings Bank v. Hunt-	
Memphis & St. L. Packet Co. v. The		ington, (two cases,).....	871
H. C. Yaeger Transp. Co.....	395	P. S. Wiltz & Co., New Orleans Nat.	
Mengis v. Lebanon Manuf'g Co.....	665	Banking Ass'n v.....	330
Mercantile Trust Co. v. Portland &		Puffer, Matthews v.....	606
O. R. Co.....	604	Pulaski County, Cissell v.....	891
Meyer, Fisher v.....	268	Pulliam v. Pulliam.....	23, 53
Meyer, Ullman v.....	241	Pulliam, Pulliam v.....	23, 53
Meyrose, Adams v.....	671		
Miles, Cuykendall v.....	342	Quintard, Brett v.....	741
Miller v. The Mayor, etc., of the City			
of New York.....	513	Ralston v. Crittenden.....	254
Miller, Gottfried v.....	471	Reinhardt, Werner v.....	676
Minneapolis & St. L. Ry. Co., Gra-		Roberts, United States v.....	540
velle v.....	711	Rundel v. Life Ass'n of America....	720
Missouri, K. & T. Ry. Co. v. Texas		Rutz v. City of St. Louis.....	338
& St. L. Ry. Co.....	497	Ryan v. Lee.....	917
Missouri, K. & T. Ry. Co., Dins-			
more v.....	210	Sandringham, The.....	556
Moch v. Virginia Fire & Marine Ins.		Schindler, United States v.....	547
Co.....	696	Schneider v. Lovell.....	666
Moore v. O'Fallon.....	593	Scotia, The.....	684
Mora v. Nunez.....	634	Scoville, Posey v.....	140
Mullan, United States v.....	785	Seale v. Vaiden, Hawkins & Roberts.	831
		Second Nat. Bank of Paterson, New	
New Orleans Nat. Banking Ass'n v.		York Silk Manuf'g Co. v.....	204
P. S. Wiltz & Co.....	330	Secor v. Toledo, P. & W. R. Co.....	15
New Process Fermentation Co. v.		Seibert Cylinder Oil Cup Co. v. Phil-	
Baltz.....	289	lips Lubricator Co.....	677
New York Grape Sugar Co. v. Amer-		Shaffer, Anderson v.....	266
ican Grape Sugar Co.....	835	Sharp v. Philadelphia Warehouse Co.	379
New York Silk Manuf'g Co. v. Sec-		Sharp, Tift v.....	673
ond Nat. Bank of Paterson.....	204	Shepard, Macdonald v.....	919
Northern Assurance Co., Waller v..	232	Sheridan, Whalen v.....	661
		Shurtleff, Chung Yune v.....	239

	Page		Page
Sioux City & St. P. R. Co., Chicago,		United States v. Central Nat. Bank.	612
M. & St. P. Ry. Co. v.	435	United States v. De Visser	642
Sixty-five Terra Cotta Vases.....	880	United States v. Ebbs.....	369
Small, Case v.....	722	United States v. Harden.....	802
Sommer, Hannon v.....	601	United States v. Jones.....	469
Southern Express Co. v. Memphis &		United States v. Keyes.....	876
L. R. R. Co.....	210	United States v. Krum.....	823
Southern Express Co. v. St. Louis, I.		United States v. Long	879
M. & S. Ry. Co.....	210, 869	United States v. Mullan.....	785
Spill v. Celluloid Manuf'g Co.....	290	United States v. Odeneal.....	616
Star Salt Caster Co. v. Alden.....	555	United States v. Roberts.....	540
State of Missouri v. Tiedermann....	20	United States v. Schindler.....	547
Stein, Lindsay v.....	907	United States v. Turnure.....	642
Stivers, Kensett v.....	517	United States v. Wickersham.....	505
St. Louis, I. M. & S. Ry. Co., South-		United States, Bates v.....	92
ern Express Co. v.....	210, 869	United States, Doyle v.....	269
St. Louis & N. O. Transp. Co., Hi-		United States ex rel. Watts v. Jus-	
bernia Ins. Co. v.....	596	tices of Lauderdale County.....	460
Stockton v. Maddock.....	132	Vaiden, Hawkins & Roberts, Seale v.	831
Strother & Conklin, Buford & Co. v.	406	Valette Dry-dock, Cope v.....	142
Strother & E. Conklin, John Dere		Van Hoven v. Irish.....	13
& Co. v.....	406	Vermont Farm Machine Co. v. Con-	
Tanner, Olney v.....	101	verse.....	825
Texas & St. L. Ry. Co., Missouri, K.		Vigilant, The.....	765
& T. Ry. Co. v.....	497	Virginia Fire & Marine Ins. Co.,	
Thames, The.....	848	Moch v.....	696, 710
Thayer, Hart v.....	746	Walsh, Preston v.....	315
Third Nat. Bank v. Harrison, (two		Waller v. Northern Assurance Co..	232
cases,).....	243	Warder, In re.....	275
Thompson, Allen & Co. v.....	116	Warne, In re.....	377
Thompson, McIntyre v.....	531	Waters, Crane v.....	619
Tiedermann, State of Missouri v....	20	Watts v. J. B. Camors & Co.....	145
Tift v. Sharp.....	673	Wellington, Whiting v.....	810
Tilley, Hinsdale-Doyle Granite Co. v.	799	Werner v. Reinhardt.....	676
Toledo, P. & W. R. Co., Secor v....	15	Whalen v. Sheridan.....	661
Torrens v. Hammond.....	900	White v. Arthur.....	80
Town of Hancock, Kershaw v.....	541	White v. Heath.....	291
Town of Hancock, McCall v.....	8	Whiting v. Wellington.....	810
Town of Shawangunk, Carrier v....	220	Wickersham, United States v.....	505
Tucker, Greenwalt v.....	884	Williams, Benedict v.....	208
Tufts v. Matthews.....	609	Wolfe & Co., In re.....	383
Turnure, United States v.....	642	Wooster v. Howe Machine Co.....	666
Two Marys, The.....	919	Worley v. Northwestern Masonic Aid	
Ullman v. Meyer.....	241	Ass'n.....	227
Union Railway & Transit Co., Keep v.	454	Worthington, Dickinson v.....	860
United States v. Bartow.....	873, 874	Young v. Dunn.....	717
United States v. Bunton.....	730		
United States v. Campbell.....	816		

CASES REPORTED.

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS AND DISTRICTS.

FIRST CIRCUIT.

Page

CIRCUIT COURT, D. MAINE.

Atwood v. The Portland Co.....	283
Portland Co., The, Atwood v.....	283

CIRCUIT COURT, D. MASSACHUSETTS.

Alden, Star Salt Caster Co. v.....	555
Barber v. Hallett.....	130
Burgess v. Graffam.....	216
Crane v. Waters.....	619
Cuykendall v. Miles.....	342
Graffam, Burgess v.....	216
Hallett, Barber v.....	130
Hartford, P. & F. R. Co., Mason v.....	334
Macdonald v. Shepard.....	919
Mason v. Hartford, P. & F. R. Co....	334
Miles, Cuykendall v.....	342
Phillips Lubricator Co., Seibert Cylin-	
der Oil Cup Co. v.....	677
Seibert Cylinder Oil Cup Co. v. Phil-	
lips Lubricator Co.....	677
Shepard, Macdonald v.....	919
Star Salt Caster Co. v. Alden.....	555
Waters, Crane v.....	619
Wellington, Whiting v.....	810
Whiting v. Wellington.....	810

DISTRICT COURT, D. MASSACHUSETTS.

Henry Chapel, The.....	777
------------------------	-----

CIRCUIT COURT, D. NEW HAMPSHIRE.

Keyes, United States v.....	876
Mercantile Trust Co. v. Portland &	
O. R. Co.....	604
Portland & O. R. Co., Mercantile	
Trust Co. v.....	604
United States v. Keyes.....	876

CIRCUIT COURT, D. RHODE ISLAND.

Heath, White v.....	291
Matthews, Tufts v.....	609

v. 10—FED.

Page

Tufts v. Matthews.....	609
White v. Heath.....	291

DISTRICT COURT, D. RHODE ISLAND.

Boynton, Jesse, In re.....	277
Boynton, Lyman, In re.....	277
Boynton Bros., In re.....	277

SECOND CIRCUIT.

CIRCUIT COURT, D. CONNECTICUT.

Brett v. Quintard.....	741
Converse, Vermont Farm Machine	
Co. v.....	825
Hammond v. Olmstead Bros.....	223
Jacobs v. Ousatonic Water Co.....	826
Olmstead Bros., Hammond v.....	223
Ousatonic Water Co., Jacobs v.....	826
Quintard, Brett v.....	741
Vermont Farm Machine Co. v. Con-	
verse.....	825

CIRCUIT COURT, E. D. NEW YORK.

Ehret v. Pierce.....	553
Gunther v. Liverpool, London &	
Globe Ins. Co.....	830
Liverpool, London & Globe Ins. Co.,	
Gunther v.....	836
Pierce, Ehret v.....	553

DISTRICT COURT, E. D. NEW YORK.

Vigilant, The.....	765
--------------------	-----

CIRCUIT COURT, N. D. NEW YORK.

American Grape Sugar Co., New	
York Grape Sugar Co. v.....	835
Kershaw v. Town of Hancock.....	541
McCall v. Town of Hancock.....	8
New York Grape Sugar Co. v. Amer-	
ican Grape Sugar Co.....	835
Town of Hancock, Kershaw v.....	541
Town of Hancock, McCall v.....	8

(ix)

	Page		Page
CIRCUIT COURT, S. D. NEW YORK.		United States v. Bartow.....	
Adams, Hostetter v.....	838	United States v. Jones.....	873, 874
Arthur, White v.....	80	United States v. Schindler.....	547
Baltzer, Bischoffsheim v.....	1	Werner v. Reinhardt.....	676
Bartow, United States v.....	873, 874	Whalen v. Sheridan.....	661
Benedict v. Williams.....	208	White v. Arthur.....	80
Bischoffsheim v. Baltzer.....	1	Williams, Benedict v.....	208
Bruce v. Marder.....	750	Wooster v. Howe Machine Co.....	666
Buerk v. Imhaeuser.....	608		
Carrier v. Town of Shawangunk.....	220	DISTRICT COURT, S. D. NEW YORK.	
Celluloid Manuf'g Co., Spill v.....	290	Blue Bonnet, The.....	150
Compagnie Generale Transatlan- tique, People of the State of New York v.....	357	Campbell, United States v.....	816
Faulks v. Kamp.....	675	Cargo of Malt, A.....	774
Fisher v. Meyer.....	268	Cary, In re.....	622
Flagg v. Manhattan Ry. Co.....	413	Central Nat. Bank, United States v.....	612
Hardy v. Marble.....	752	De Visser, United States v.....	642
Harris v. Hess.....	263	D. M. Anthony, The.....	760
Hart v. Thayer.....	746	Fish, Paddock v.....	125
Hess, Harris v.....	263	Grand Republic, The.....	398
Hostetter v. Adams.....	838	Hitchcock, Lewis v.....	4
Howe Machine Co., Wooster v.....	666	Irzo v. Perkins.....	779
Imhaeuser, Buerk v.....	608	Lewis v. Hitchcock.....	4
Jennings v. Kibbe.....	669	Matthews, Platt v.....	280
Jones, United States v.....	469	Olney v. Tanner.....	101
Kamp, Faulks v.....	675	Paddock v. Fish.....	125
Kensett v. Stivers.....	517	Paul Revere, The.....	156
Kibbe, Jennings v.....	669	Perkins, Irzo v.....	779
Lebanon Manuf'g Co., Mengis v.....	665	Platt v. Matthews.....	280
Leipsic, The.....	585	Sixty-five Terra Cotta Vases.....	880
Liegeois v. McCracken.....	664	Tanner, Olney v.....	101
Lindsay v. Stein.....	907	Thames, The.....	848
Lovell, Schneider v.....	666	Turnure, United States v.....	642
Manhattan Ry. Co., Flagg v.....	413	Two Marys, The.....	919
Marble, Hardy v.....	752	United States v. Campbell.....	816
Marder, Bruce v.....	750	United States v. Central Nat. Bank.....	612
Matthews v. Puffer.....	606	United States v. De Visser.....	642
Mayor, etc., of the City of New York, The, Miller v.....	513	United States v. Turnure.....	642
McCracken, Liegeois v.....	664		
Mengis v. Lebanon Manuf'g Co.....	665	THIRD CIRCUIT.	
Meyer, Fisher v.....	268	CIRCUIT COURT, D. NEW JERSEY.	
Meyer, Ullman v.....	241	Apgar v. Christophers.....	857
Miller v. The Mayor, etc., of the City of New York.....	513	Christophers, Apgar v.....	857
People of the State of New York v. Compagnie Generale Transatlan- tique.....	357	Maddock, Stockton v.....	132
Puffer, Matthews v.....	606	New York Silk Manuf'g Co. v. Sec- ond Nat. Bank of Paterson.....	204
Reinhardt, Werner v.....	676	Second Nat. Bank of Paterson, New York Silk Manuf'g Co. v.....	204
Schindler, United States v.....	547	Stockton v. Maddock.....	132
Schneider v. Lovell.....	666		
Sharp, Tift v.....	673	DISTRICT COURT, D. NEW JERSEY.	
Sheridan, Whalen v.....	661	Ant, The.....	234
Spill v. Celluloid Manuf'g Co.....	290	Warder, In re.....	275
Stein, Lindsay v.....	907		
Stivers, Kensett v.....	517	CIRCUIT COURT, E. D. PENNSYLVANIA.	
Thayer, Hart v.....	746	Atlantic & O. R. Co., Karns v.....	309
Tift v. Sharp.....	673		
Town of Shawangunk, Carrier v.....	220		
Ullman v. Meyer.....	241		

	Page
Baltz, New Process Fermentation Co. v.....	289
Bigelow Carpet Co. v. Dobson.....	385
Dobson, Bigelow Carpet Co. v.....	385
Dobson, Hartford Carpet Co. v.....	385
Garrett, Hammerschlag v.....	479
Hammerschlag v. Garrett.....	479
Hartford Carpet Co. v. Dobson.....	385
Karns v. Atlantic & Ohio R. Co.....	309
New Process Fermentation Co. v. Baltz.....	289
Philadelphia Warehouse Co., Sharp v.	379
Sharp v. Philadelphia Warehouse Co.	379

DISTRICT COURT, E. D. PENNSYLVANIA.

Carao v. Guimaraes.....	783
Guimaraes, Carao v.....	783
Lord Clive, The.....	135
Warne, In re.....	377
Wolfe & Co., In re.....	383

CIRCUIT COURT, W. D. PENNSYLVANIA.

First Nat. Bank of Kittanning, Linton v.....	894
Linton v. First Nat. Bank of Kittanning.....	894

FOURTH CIRCUIT.

CIRCUIT COURT, D. MARYLAND.

Dickinson v. Worthington.....	860
Hammond, Torrens v.....	900
Torrens v. Hammond.....	900
Worthington, Dickinson v.....	860

DISTRICT COURT, D. MARYLAND.

Leversons, The.....	753
---------------------	-----

CIRCUIT COURT, W. D. NORTH CAROLINA.

McIntyre v. Thompson.....	531
Thompson, McIntyre v.....	531

DISTRICT COURT, W. D. NORTH CAROLINA.

Ebbs, United States v.....	369
Harden, United States v.....	802
United States v. Ebbs.....	369
United States v. Harden.....	802

CIRCUIT COURT, E. D. VIRGINIA.

Moch v. Virginia Fire & Marine Ins. Co.....	696, 710
---	----------

	Page
Virginia Fire & Marine Ins. Co., Moch v.....	696, 710

DISTRICT COURT, E. D. VIRGINIA.

Mary Stewart, The.....	137
Sandringham, The.....	556

FIFTH CIRCUIT.

CIRCUIT COURT, E. D. GEORGIA.

Long, United States v.....	879
United States v. Long.....	879

CIRCUIT COURT, S. D. GEORGIA, W. D.

Lanning v. Lockett.....	451
Lockett, Lanning v.....	451

CIRCUIT COURT, E. D. LOUISIANA.

Alabama, The.....	394
Case v. Small.....	722
Centennial, The.....	397
Copes, Gaylord v.....	827
Culliford & Clark, Maury & Co. v...	388
De Smet, The.....	483
Ellis, Marion v.....	410
Gauche v. London & Lanc. Ins. Co..	347
Gaylord v. Copes.....	827
J. B. Camors & Co., Watts v.....	145
Life Ass'n of America, Rundel v....	720
London & Lancashire Ins. Co., Gauche v.....	347
Marion v. Ellis.....	410
Maury & Co. v. Culliford & Clark..	388
New Orleans Nat. Banking Ass'n v. P. S. Wiltz & Co.....	330
Posey v. Scoville.....	140
P. S. Wiltz & Co., New Orleans Nat. Banking Ass'n v.....	330
Rundel v. Life Ass'n of America....	720
Scoville, Posey v.....	140
Small, Case v.....	722
Watts v. J. B. Camors & Co.....	145

DISTRICT COURT, E. D. LOUISIANA.

Citizens' Ins. Co. v. Kountz Line...	768
Cope v. Vallette Dry-dock.....	142
Cusimano, Lindsay, Gracie & Co. v..	302
Kountz Line, Citizens' Ins. Co. v...	768
Lindsay, Gracie & Co. v. Cusimano..	302
Valette Dry-dock, Cope v.....	142

DISTRICT COURT, N. D. MISSISSIPPI.

Seale v. Vaiden, Hawkins & Roberts.	831
Vaiden, Hawkins & Roberts, Seale v.	831

	Page		Page
CIRCUIT COURT, E. D. TEXAS.		Bates v. United States.....	92
Dunn, Young v.....	717	Crouch, Aldrich v.....	305
Greene v. Klinger, (three cases,)....	689	Doyle v. United States.....	269
Klinger, Greene v., (three cases,)....	689	Evans v. Faxon.....	312
Young v. Dunn.....	717	Faxon, Evans v.....	312
		Harvey v. Lord.....	236
CIRCUIT COURT, N. D. TEXAS.		Hinsdale-Doyle Granite Co. v. Tilley.....	799
Missouri, K. & T. Ry. Co. v. Texas		Irvine, McKay v.....	725
& St. L. Ry. Co.....	497	Kerting v. American Oleograph Co.....	17
Texas & St. L. Ry. Co., Missouri, K.		Lord, Harvey v.....	236
& T. Ry. Co. v.....	497	McKay v. Irvine.....	725
		Secor v. Toledo, P. & W. R. Co.....	15
CIRCUIT COURT, W. D. TEXAS.		Tilley, Hinsdale-Doyle Granite Co. v.....	799
Preston v. Walsh.....	315	Toledo, P. & W. R. Co., Secor v.....	15
Walsh, Preston v.....	315	United States, Bates v.....	92
		United States, Doyle v.....	269
SIXTH CIRCUIT.		DISTRICT COURT, N. D. ILLINOIS.	
CIRCUIT COURT, S. D. OHIO, E. D.		Artt, Osgood v.....	365
Anderson v. Shaffer.....	266	Osgood v. Artt.....	365
Shaffer, Anderson v.....	266		
CIRCUIT COURT, S. D. OHIO, W. D.		CIRCUIT COURT, E. D. WISCONSIN.	
Buntin, United States v.....	730	Gottfried v. Miller.....	471
Henderson, In re.....	385	Miller, Gottfried v.....	471
Roberts, United States v.....	540		
United States v. Buntin.....	730	DISTRICT COURT, E. D. WISCONSIN.	
United States v. Roberts.....	540	Scotia, The.....	684
CIRCUIT COURT, W. D. TENNESSEE.			
Justices of Lauderdale County,		CIRCUIT COURT, W. D. WISCONSIN.	
United States ex rel. Watts v.....	460	Bellew, Hubbard v.....	849
Pulliam v. Pulliam.....	23, 53	Bookwalter v. Clark.....	793
Pulliam, Pulliam v.....	23, 53	Clark, Bookwalter v.....	793
United States ex rel. Watts v. Jus-		Hubbard v. Bellew.....	849
tices of Lauderdale County.....	460		
United States v. Wickersham.....	505	EIGHTH CIRCUIT.	
Wickersham, United States v.....	505	CIRCUIT COURT, E. D. ARKANSAS.	
DISTRICT COURT, W. D. TENNESSEE.		Cissell v. Pulaski County.....	891
Allen & Co. v. Thompson.....	116	Conway County, Goldman v.....	888
Thompson, Allen & Co. v.....	116	Goldman v. Conway County.....	888
		Memphis & L. R. R. Co., Overton v.....	866
SEVENTH CIRCUIT.		Memphis & L. R. R. Co., Southern	
CIRCUIT COURT, N. D. ILLINOIS.		Express Co. v.....	210
Aldrich v. Crouch.....	305	Overton v. Memphis & L. R. R. Co.....	866
American Oleograph Co., Kerting v.....	17	Pulaski County, Cissell v.....	891
		Southern Express Co. v. Memphis &	
		L. R. R. Co.....	210
		CIRCUIT COURT, D. COLORADO.	
		Denver & R. G. R. Co., Dinsmore v.....	210
		Dinsmore v. Denver & R. G. R. Co.....	210
		Gold Park Mining Co., Henry v.....	11
		Henry v. Gold Park Mining Co.....	11

	Page		Page
CIRCUIT COURT, D. IOWA.		Cavender v. Cavender.....	828
Boyd v. Bradish.....	406	Cavender, Cavender v.....	828
Bradish, Boyd v.....	406	City of St. Louis, Rutz v.....	338
Buford & Co. v. Strother & Conklin.	406	Duncan v. Greenwalt.....	800
Chicago, M. & St. P. Ry. Co. v.		Greenwalt v. Tucker.....	884
Sioux City & St. P. R. Co.....	435	Greenwalt, Duncan v.....	800
John Dere & Co. v. Strother & E.		Harrison, Third Nat. Bank v., (two	
Conklin.....	406	cases,).....	243
Northwestern Masonic Aid Ass'n,		H. C. Yaeger Transp. Co., The,	
Worley v.....	227	Memphis & St. Louis Packet Co. v..	395
Sioux City & St. P. R. Co., Chicago,		Hibernia Ins. Co. v. St. Louis & N.	
M. & St. P. Ry. Co. v.....	435	O. Transp. Co.....	596
Strother & Conklin, Buford & Co. v.	406	Huntington, Providence Savings	
Strother & E. Conklin, John Dere		Bank v., (two cases,).....	871
& Co. v.....	406	Indianapolis & St. L. R. Co., Keep v.	454
Worley v. Northwestern Masonic Aid		Keep v. Indianapolis & St. L. R. Co.	454
Ass'n.....	227	Keep v. Union Railway & Transit	
		Co.....	454
		Krum, United States v.....	823
CIRCUIT COURT, D. IOWA, N. D.		Lee, Ryan v.....	917
Boone v. Iowa & Minn. Const. Co..	401	Memphis & St. L. Packet Co. v. The	
Chicago, M. & St. P. R. R., Greg-		H. C. Yaeger Transp. Co.....	395
ory v.....	529	Meyrose, Adams v.....	671
Chicago, M. & St. P. R. R., Harris v.	529	Providence Savings Bank v. Hunt-	
Chicago, M. & St. P. R. R., Meighen		ington, (two cases,).....	871
v.....	529	Rutz v. City of St. Louis.....	338
Gregory v. Chicago, M. & St. P.		Ryan v. Lee.....	917
R. R.....	529	St. Louis, I. M. & S. Ry. Co., South-	
Harris v. Chicago, M. & St. P. R. R.	529	ern Express Co. v.....	210, 869
Iowa & Minn. Const. Co., Boone v..	401	St. Louis & N. O. Transp. Co., Hi-	
Iowa & Minn. Const. Co., In re....	401	bernia Ins. Co. v.....	596
Meighen v. Chicago, M. & St. P. R.		Southern Express Co. v. St. Louis, I.	
R.....	529	M. & S. Ry. Co.....	210, 869
Northern Assurance Co., Waller v..	232	State of Missouri v. Tiedermann....	20
Waller v. Northern Assurance Co..	232	Third Nat. Bank v. Harrison, (two	
		cases,).....	243
		Tiedermann, State of Missouri v....	20
		Tucker, Greenwalt v.....	884
		Union Railway & Transit Co., Keep v.	454
		United States v. Krum.....	823
CIRCUIT COURT, D. KANSAS.			
Atchison, T. & S. Fe R. Co., Dins-		DISTRICT COURT, E. D. MISSOURI.	
more v.....	210	Moore v. O'Fallon.....	593
Dinsmore v. Atchison, T. & S. Fe R.		O'Fallon, Moore v.....	593
Co.....	210		
Dinsmore v. Missouri, K. & T. Ry.		CIRCUIT COURT, W. D. MISSOURI.	
Co.....	210	Crittenden, Ralston v.....	254
Hannon v. Sommer.....	601	Ralston v. Crittenden.....	254
Missouri, K. & T. Ry. Co., Dins-			
more v.....	210	CIRCUIT COURT, D. NEBRASKA.	
Sommer, Hannon v.....	601	Marion County v. McIntyre.....	543
		McIntyre, Marion County v.....	543
CIRCUIT COURT, D. MINNESOTA.			
Gravelle v. Minneapolis & St. L. Ry.		NINTH CIRCUIT.	
Co.....	711		
Irish, Van Hoven v.....	13	CIRCUIT COURT, D. CALIFORNIA.	
Minneapolis & St. L. Ry. Co., Gra-		Mora v. Nunez.....	634
velle v.....	711		
Van Hoven v. Irish.....	13		
CIRCUIT COURT, E. D. MISSOURI.			
Adams v. Meyrose.....	671		

CASES REPORTED.

	Page		Page
Mullan, United States v.....	785	Shurtleff, Chung Yune v.....	239
Nunez, Mora v.....	634	United States v. Odeneal.....	616
United States v. Mullan.....	785		

CIRCUIT COURT, D. OREGON.

Chung Yune v. Shurtleff.....	239
Odeneal, United States v.....	616

DISTRICT COURT, D. OREGON.

City of Salem, The.....	843, 847
Doxford, The.....	683
Glamara, The.....	673

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

BISCHOFFSCHEIM *v.* BALTZER and another.*

(Circuit Court, S. D. New York. January 16, 1882.)

1. EQUITY PRACTICE—TESTIMONY FOR FINAL HEARING.

Under the equity rules of the supreme court, after notice from the plaintiff that he desires the evidence to be adduced in the cause to be taken orally, all the evidence is to be so taken, subject to the power of the court, for special reasons, to annul the usual effect of such notice and order it to be taken on written interrogatories.

2. SAME—TESTIMONY TAKEN IN FOREIGN COUNTRIES.

By analogy, after such notice has been given, where testimony in a foreign country can be taken orally, it ought not, except for special reasons, to be taken otherwise. What would in any given case be sufficient special reasons, must be left to be decided in each case.

3. SAME—DEPOSITIONS UNDER SECTION 866, REV. ST.

Depositions may be taken under *dedimus potestatem*, under section 866, "according to common usage," now as at any time hitherto. The words "common usage," in regard to suits in equity, refer to the practice in courts of equity.

4. SAME—DEPOSITIONS DE BENE ESSE.

The provision for taking depositions *de bene esse* is still in force in equity cases. The mode of taking such depositions is the same as that provided for by the amendment to equity rule 67.

In Equity.

*Reported by S. Nelson White, Esq., of the New York bar.

J. H. Choate, for plaintiff.

C. M. Da Costa, for defendants.

BLATCHFORD, C. J. This is a suit in equity. Issue was joined by the filing of a replication to the answer, December 1, 1879. On the fifth of February, 1881, the plaintiff's solicitors, not having before taken any testimony, served a notice in writing on the defendants' solicitors that the plaintiff "desires the evidence to be adduced in this cause to be taken orally," and that witnesses would be examined in the city of New York on February 11th. Two witnesses for the plaintiff were examined orally under this notice, the last one in June, 1881. The time to take testimony has been extended, and has not expired. In May, 1881, the defendants' solicitors having been previously informed by the plaintiff's solicitors that the latter intended to have a commission issued to take in London, England, the deposition of the plaintiff, who resides in London, gave notice in writing to the plaintiff's solicitors that the defendants' solicitors desired to cross-examine the plaintiff orally, and requested them to have the commission executed during the ensuing July or September, when one of the defendants' solicitors would be in London and attend to the matter. To this notice no reply was ever received. One of the witnesses so examined in New York was the confidential manager of the plaintiff's business residing in London, and it appears that the plaintiff has there legal advisers who have been consulted concerning the matters in issue herein.

The plaintiff now applies for an order for a commission to examine himself on written interrogatories to be annexed to the commission, on an affidavit showing that he expects to prove by himself the material averments in the bill, or many of them. The defendants ask that if a commission to examine the plaintiff on written interrogatories be issued, the defendants have leave to cross-examine the plaintiff orally thereunder.

By rule 67 in equity, as in force prior to the December term, 1861, testimony in suits in equity might be taken by commission on written interrogatories and cross-interrogatories, but by agreement it might be taken by oral interrogatories, under a commission. This applied even to testimony to be taken where a subpoena from the court could reach the witness. By rule 68 testimony might also be taken in the cause, after it was at issue, by deposition, according to the acts of congress.

Under rule 69 publication of the testimony taken under such commissions might be ordered immediately upon the return of the com-

missions. The idea was that it was not known to the parties what the witnesses had testified to, the commission being executed without the presence of either party or solicitor. Formerly the general mode in England of examining witnesses in equity was by interrogatories in writing exhibited by the party. Daniell, Ch. Pr. c. 22, § 9. At the December term, 1861, (1 Black, 6,) a new practice was introduced by a rule made by the supreme court. The clause in rule 67 relating to taking testimony by agreement on oral interrogatories was repealed, and the rule was amended by adding to it provisions making oral examination the rule if either party desires it, and examination by written interrogatories the exception.

Under rule 67, as amended, if neither party gives notice to the other that he desires the evidence to be taken orally, then the testimony may be taken by commission, as formerly, even where the witnesses are within the reach of the subpoena of the court. But if either party gives notice to the other that he desires the evidence to be taken orally, then "all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court;" the examination to take place on notice in the presence of parties and by counsel, and the witnesses to be cross-examined and re-examined as nearly as may be in the mode used in common-law courts. At the close of the added provisions is this:

"Testimony may be taken by commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time or to a judge in vacation, for special reasons satisfactory to the court or judge."

This refers to the former way—to the way, for which the new way was substituted, in case either party should give notice of his desire for an oral taking; and the notice so given was thus made subject to the power of the court, for special reasons, to annul the usual effect of the notice. This last provision of taking testimony by commission in the usual way has no reference to issuing a *dedimus potestatem* under section 866 of the Revised Statutes, formerly section 30 of the act of September 24, 1879, (1 St. at Large, 90.) It refers to the usual way before practiced in equity cases.

Depositions may be taken under a *dedimus potestatem*, under section 866, "according to common usage," now, as at any time hitherto, in a suit in equity. The words "common usage," in regard to a suit in equity, refer to the practice in courts of equity. Under this

practice it was usual to examine witnesses abroad by written interrogatories and cross-interrogatories.

The provision of rule 68, for taking testimony in an equity case, after it is at issue, by deposition, according to the acts of congress, is still in force. Under sections 863 and 1750 of the Revised Statutes, depositions *de bene esse* in civil causes may be taken in a foreign country by any secretary of legation or consular officer. The mode of taking such depositions under sections 863, 864, and 865 is by oral questions put at the time, if desired, and not necessarily by written interrogatories given to the officer before commencing the taking. It is the same mode provided for by the amendment to rule 67. As, after either party has given notice to the other that he desires the evidence to be adduced in the cause to be taken orally, the testimony is not, except for special reasons, to be taken otherwise, so, by analogy, where testimony in a foreign country can be taken orally, it ought not, except for special reasons, to be taken otherwise. What would in any given case be sufficient special reasons must be left to be decided in each case. In the present case the defendants are, I think, entitled to cross-examine the plaintiff orally. There is no reason why his direct examination should not be taken on written interrogatories if desired.

LEWIS v. HITCHCOCK and another.

(District Court, S. D. New York. January 26, 1882.)

1. CIVIL RIGHTS ACT—DEMURRER—INN—RESTAURANT—VIDELICET.

In an action to recover a penalty of \$500 under section 2 of the civil rights act of March 1, 1875, (18 St. at Large, part 3, p. 335, Sup. Rev. St. 148,) the plaintiff must allege and prove that he is a "citizen."

Where the penalty is claimed for a denial of the privileges of an "inn," under the first section of that act, the complaint will be held sufficient on demurrer if it alleges a denial of those privileges "at a certain inn, to-wit, a restaurant at No. 9 Chatham street." The word "restaurant" has no fixed and certain legal meaning, and a place known by that name may or may not be an inn; *i. e.*, provide lodgings as well as food for guests.

The description of the place in question under a *videlicet* is not repugnant to the previous description as an inn; if it were, *semble* it would be disregarded.

Demurrer to Complaint.

Peter Mitchell and John F. Quarles, for plaintiff.

N. J. Dittenhoefer and Albert Englehardt, for defendants.

BROWN, D. J. This is an action brought by the plaintiff to recover a penalty of \$500 under section 2 of the civil rights act of March 1, 1875, (18 St. at Large, part 3, p. 335, Supp. Rev. St. 148.)

The complaint states, in substance, that the defendants are "proprietors of a certain inn, to-wit, a restaurant at No. 9 Chatham street," in this city, and that on the fourth day of November, 1881, the plaintiff, a colored person, was refused food or refreshments there by orders of the defendants on account of his race or color. The defendants demur to the complaint on the grounds—*First*, that the plaintiff does not allege in his complaint that he is a "citizen;" and, *second*, that the place kept by the defendants is, in effect, alleged to be a mere restaurant and not an "inn."

Section 2 of the act above referred to provides that "any person who shall violate the foregoing section, (section 1,) by denying to any *citizen*, except for reasons by law applicable to citizens of every race and color, regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, shall forfeit and pay the sum of \$500 to the person aggrieved thereby, and shall also be deemed guilty of a misdemeanor," etc.

Section 1 declares that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of *inns*, public conveyances on land or water, theaters, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

It will be noticed that section 2, which imposes the penalty sought to be recovered in this case, is limited to a denial of the rights referred to in the first section to "any citizen." The distinction between citizens and aliens is maintained in so many public statutes that it cannot be supposed that the use of the word "citizen" in this section is without reference to its proper signification of persons either born or naturalized in this country. The ordinary rule is that criminal and penal statutes like the present are to be construed strictly—that is, they are not to be extended beyond the fair and natural meaning of the language used; and there is nothing in the nature of the subject from which it can be presumed that congress intended to legislate in this instance for the benefit of aliens, so as to make it criminal for our citizens to refuse to aliens the privileges referred to. To entitle himself to recover the plaintiff must therefore prove that he is a "citi-

zen." Such an allegation should therefore appear upon the face of the complaint, and the complaint is insufficient on demurrer for want of it. *U. S. v. Taylor*, 3 FED. REP. 563; *Mersevole v. Union Paper Collar Co.* 6 Blatchf. 356.

This would be sufficient to dispose of the present demurrer; but as this defect may be cured by amendment, and as the parties have argued at length the second ground of demurrer above stated, it is proper that the views of the court should also be stated on that point.

The only part of section 1 under which plaintiff's cause of action can come is that which concerns the "accommodations, advantages, facilities, and privileges of inns." The complaint charges that the plaintiff was denied these privileges at a "certain inn, to-wit, a restaurant at No. 9 Chatham street." The defendants contend that this averment is defective in not alleging unequivocally that the place where the accommodations were denied him was in fact an inn where travelers are lodged and fed; and because the statement of the complaint is only equivalent to an allegation that the place was a restaurant, which the plaintiff means to claim is in law an inn.

If such were the proper construction of the language of the complaint, the objection would be well taken. The plaintiff cannot recover except upon proof that the place was an inn in the legal sense; that is, a place provided for the lodging and entertainment of travelers. A coffee-house, or a mere eating-house, is not an inn. To constitute an inn there must be some provision for the essential needs of a traveler upon his journey, viz., lodging as well as food. These two elements of an inn may doubtless be present in very disproportionate degrees, as the needs of the situation may require; but both must in some degree be present to constitute an inn. *Story*, Bail, § 475; *Carpenter v. Taylor*, 1 Hilt. 193; *Wintermute v. Clark*, 5 Sandf. 242; *People v. Jones*, 54 Barb. 316.

It was not necessary for the plaintiff in his complaint to allege anything more than that the place was an inn, as that is an ancient English word with a fixed and definite legal signification, and must be held to be so used in the statute of 1875. The term "restaurant" has no definite legal meaning. In Webster's Dictionary it is not even recognized as a word yet Anglicised. As currently understood it doubtless means only, or chiefly, an eating-house. But not unfrequently a bar forms a part of it; sometimes lodgings in addition; and it is also just as currently understood that in numerous resorts termed restaurants some lodgings for travelers are provided or alleged to be provided, so as to obtain a license for the sale of liquors, which is

allowed under the excise law of this state to hotels, taverns, or inns, only. Sess. Laws N. Y. 1857, c. 628, §§ 2, 8, 13; *Behan v. The People*, 17 N. Y. 516; *Schwab v. The People*, 4 Hun. 520. However this may be, it is sufficient to say that the term "restaurant" has no such fixed and definite legal meaning as necessarily to exclude its being an inn in the legal sense. It may be an inn, or it may not be, according to its real character. The name by which it goes is of little or no account, (*Carpenter v. Taylor*, 1 Hilt. 195,) and the court cannot say judicially that the place in question, though described under a *videlicet* as a restaurant, may not also be an inn, as previously averred.

The description of this place under a *videlicet* as "a restaurant at No. 9 Chatham street" is not, therefore, necessarily repugnant to the previous averment that the place was an inn. The office of a *videlicet* is to give some additional particulars of time, place, or circumstance explanatory of previous statements made in general terms. A *videlicet* is not allowed to render nugatory previous averments otherwise good.

In *Gleason v. McVickar*, 7 Cow. 43, it is said by the court, in relation to allegations under a *videlicet*, "if they be impossible or contrary or repugnant to the preceding matter they shall be rejected as surplusage and void." 2 Saund. 298, note 1. Under this rule, if a restaurant could not possibly be an inn, the description under the *videlicet* would be rejected as repugnant to the previous statement that the place was an inn. For the reasons above stated, however, there is no necessary repugnance between the two; and I consider the whole statement, taken together, as equivalent to an averment that the place referred to, though called a restaurant, was, in fact, an inn, and the complaint in this respect is, therefore, held sufficient.

On the first ground of objection, however, the demurrer must be sustained and judgment entered for the defendants, unless the plaintiff within 20 days amend his complaint and pay the costs of the demurrer.

McCALL v. TOWN OF HANCOCK.

(Circuit Court, N. D. New York. January, 1882.)

1. MUNICIPAL BONDS—RECITALS—BONA FIDE PURCHASERS—STATE AND FEDERAL COURTS.

A statute of a state authorized commissioners, appointed for a town, to borrow money and execute bonds for the town in aid of a railroad company, and provided that they should exercise their authority only upon the condition that the assent of a majority of the taxables should be obtained, which should be proved by the affidavit of one of the assessors of the town. The statute made it the duty of the assessors to make such affidavit when the requisite assents should have been obtained. *Held*, that *bona fide* purchasers of the bonds are not required to show that the requisite number of taxables assented to their issue, as the affidavit of the assessor is conclusive in their favor; and that the decision of the highest court of the state to the contrary, if rendered after the rights of such purchasers were acquired, is not binding upon a circuit court of the United States.

At Law.

E. B. Thomas, for complainant.

Wm. Gleason, for defendant.

WALLACE, D. J. The evidence shows, what so frequently appears in actions upon coupons and municipal bonds, that the plaintiff purchased the coupons, at the suggestion of those who formerly owned them, with a view to collecting them in this court, when it was supposed a recovery could not be obtained upon them in the state courts. By the terms of the purchase the former owners guaranty the collection of the coupons. The plaintiff is protected from costs if he is defeated, and it may be conjectured, from the fact that he is not to pay for the coupons until two years and a half after the time of purchase, that it was intended by the parties he should not pay for them at all, if, in the mean time, the suit which he should bring should be decided adversely to him. Nevertheless, under the repeated decisions of this court, as the plaintiff is the owner of the coupons, he can maintain this action, and his intent in acquiring them is immaterial. *McDonald v. Smalley*, 1 Pet. 620; *Barney v. Baltimore City*, 6 Wall. 288; *Osborne v. Brooklyn City R. Co.* 5 Blatchf. 368. He is the real party in interest and that suffices. *Allen v. Brown*, 44 N. Y. 228.

It has heretofore been held by this court that a *bona fide* holder of these coupons is entitled to recover thereon notwithstanding the irregularities which took place in the issuing of the bonds. *Foote v. Town of Hancock*, 15 Blatchf. 343. Since that decision the court of appeals has decided to the contrary. *Cagwin v. Town of Hancock*, 12 W. D. 96.

And it is now insisted that this court should yield to that decision and follow it, as the construction of a state statute by the highest court of the state. If that decision had been pronounced at the time the bonds were issued from which these coupons were cut, and before the rights of purchasers had arisen, the duty of this court would be plain. It would follow the decision, although not convinced by the reasoning upon which it was predicated. But research of counsel has failed to find a case in which the supreme court has adjudged municipal bonds issued under a state statute to be invalid in the hands of *bona fide* holders simply because the highest court of the state has so determined after the rights of such holders had intervened. Sometimes that tribunal has placed itself upon the ground that such questions relate to commercial securities and belong to the domain of general jurisprudence, in which the court will follow its own convictions, as in *Township of Pine Grove v. Talcott*, 19 Wall. 666, and *Town of Venice v. Murdock*, 92 N. J. 494. And in other cases, on the ground that prior adjudications of the state courts upon similar statutes were in conflict with the later decisions.

Whether these adjudications are a departure from the doctrine established by the earlier decisions of that court, of which *Green v. Lessee of Neal*, 6 Pet. 291, is an illustration, is not for this court to inquire, because its duty is plain to conform its judgments to the views of its superior tribunal as they are now entertained by that body. It has, indeed, been repeatedly said by the supreme court, in actions upon such bonds, that where there has been a fixed and settled construction by the state courts, it would be unseemly to depart from that construction; but this was said in cases where such construction has been settled before the bonds were issued. See *Township of Elmwood v. Marcey*, 92 U. S. 289. On the other hand, as in *Fairfield v. County of Gallatin*, 100 U. S. 47, the court has not hesitated to reverse its own rulings, adverse to the validity of such bonds, in order to follow later decisions of the state courts sustaining their validity.

The case of *Town of Venice*, 92 U. S. 494, must be accepted as controlling upon this court in the disposition of the present case, both because it is one of the most recent expositions of the views of the supreme court upon the general questions involved, and because it is a precedent directly in point. There, the validity of the bonds issued under a statute of this state, very similar to the statute under which the bonds in suit were issued, was the question under consideration. That statute authorized the supervisor of the town and the railroad

commissioners to borrow money and execute bonds for the town in aid of a railroad company. It provided, however, that they should have no power to do so until the written assent of two-thirds of the taxables of the town should have been obtained and filed in the clerk's office of the county, together with the affidavit of such supervisor or commissioner, or any two of them, to the effect that the persons assenting comprised two-thirds of the taxables. Assents were filed, together with the requisite affidavits, and the bonds were issued, but it was not shown upon the trial that two-thirds of the taxables had in fact assented. Notwithstanding the decision of the court of appeals of this state, that under this statute the *onus* was on the bondholder to show in a suit against the town that two-thirds of the taxables had assented, (*Stavin v. Town of Genoa*, 23 N. Y. 439,) and notwithstanding the decision of the same court upon a very similar statute in *Gould v. Town of Sterling*, 23 N. Y. 456, the supreme court held that the act constituted the supervisor and commissioners a tribunal to determine whether the requisite assents had been obtained, and their decision, as evinced by making the affidavits, and issuing the bonds, was conclusive in favor of a *bona fide* holder.

The bonds in the present case were issued under a statute which authorized commissioners appointed for the town to borrow money and execute bonds for the town in aid of the railroad company. The act provides that the authority of the commissioners shall only be exercised upon the condition that the assent shall be obtained of a majority of the taxables, and declares that the fact that such majority has been obtained shall be "proved" by the affidavit of one of the assessors of the town. The act makes it the duty of the assessors to make such affidavit when the requisite assents shall have been obtained. If there is any material difference between this act and the one considered in *Town of Venice v. Murdock*, it is that here the statute declares the fact of the consents having been obtained "proved" by the affidavit, while in the other such effect could only arise by implication,—a difference which it might be supposed would materially fortify the position of the purchasers of the present bonds.

Since these bonds were issued the court of appeals has decided, notwithstanding the declaration of the act that the facts that the requisite assents have been obtained shall be proved by the affidavit, that it is still incumbent on the purchaser to ascertain whether the fact thus proved is true or not. In *Town of Venice v. Murdock* the supreme court held he was not required to look behind the recital in the bond.

This court cannot follow the court of appeals without obviously ignoring the plain and conclusive adjudication of the supreme court upon the same question in *Town of Venice v. Murdock*.

It must, therefore, be determined that the plaintiff is entitled to judgment, although he failed to show that the requisite number of taxables had assented to the issuing of the bonds.

HENRY and others v. GOLD PARK MINING CO.

(Circuit Court, D. Colorado. December 20, 1881.)

I. GARNISHMENT—CODE OF COLORADO, §§ 111, 112.

Sections 111 and 112 of the Code of Colorado, which provide that the defendant may release any property in the hands of the sheriff, by virtue of any writ of attachment, by executing an undertaking to redeliver on demand, if the plaintiff recover judgment in the action and the attachment is not dissolved, the attached property to be applied to the payment of the judgment, etc., do not provide for discharging garnishees or giving bond as therein specified.

On Motion for the Discharge of a Garnishee.

Sam. P. Rose, for plaintiff.

Wells, Smith & Macon, for defendant.

HALLETT, D. J., (orally.) The sections of the Code to which reference was made do not provide for discharging garnishees on giving bond as therein specified; and I think that the language of the sections precludes the notion that the garnishees can be within its provisions.

The first section (111) declares that "the defendant may at any time release any property in the hands of the sheriff, by virtue of any writ of attachment, by executing an undertaking as provided for in the next section; and all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in his hands, shall be released from the attachment and delivered to the defendant, upon the justification of the sureties in the undertaking;" and the condition of the undertaking, as given in the next section, is that "the defendant will, if the plaintiff shall recover judgment in the action and the attachment is not dissolved, on demand redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will pay to the plaintiff the full value of the property so released." This certainly cannot be applicable to a debt due

from a third party, a stranger to the suit, because that cannot be said to be in the hands of the officer in any way. If that construction should be given to the law, it would be necessary that the officer should determine the value of the indebtedness; the amount and value of it. Now, the garnishee is not required to answer before him; it appears to be optional with him whether he will answer before the officer or come into court.

Mr. Wells. Your honor is mistaken about that provision. If the party garnished don't give a statement of what is in his hands he is treated as in contempt.

The Court. Well, I doubt whether that is the construction to be put upon the statute. But if that be so, the garnishee may not answer truly; he may deny; and if he admits the indebtedness, he may not admit the full amount. When he denies, it is competent for the plaintiff to meet his denial, and go to trial upon the issue so joined. And if he admits an indebtedness, and the plaintiff contends that he owes more than he admits, he may deny that also, and go to trial upon that, and compel him to pay the full amount that he may be able to show is due from him. So that if the garnishee be compelled to answer before the officer, and does answer, it cannot be said that his answer shall be taken to be true for the purpose of fixing the amount of the bond to be given to the officer in case he be discharged.

Indeed, it seems to me there is no provision which will be adequate and sufficient to secure the plaintiff for the discharge of a garnishee, except it be one to pay the judgment, such as is often found in these statutes regulating attachments; and I think it is very clear, as the statute stands here, that the garnishees are not within its provisions. If the garnishee pays over the money in his hands to the sheriff, then it may be said that that is money collected by the sheriff within the provisions of section 111; and unquestionably when the garnishee pays, the defendant may by giving bond as provided in these sections have that money released and surrendered to him. But I think the sections as they stand are applicable only to property which is in the hands of the officer, either money or goods; something which he actually holds in his possession.

The motion will be denied.

VAN HOVEN v. IRISH.

(Circuit Court, D. Minnesota. January, 1882.)

I. CONTRACT MADE ON SUNDAY—AFFIRMANCE ON A WEEK DAY.

Affirmance on a week day of a contract of bargain and sale entered into on Sunday, and void for that reason, makes it valid.

The plaintiff and defendant, on May 8, 1880, entered into a contract for the sale and delivery of cattle, and \$100 was paid the defendant on the contract. Subsequently this contract was rescinded, and another one entered into, varying somewhat in its terms, and the \$100 retained by defendant as part performance. The defendant claims this latter contract was made on Sunday and is void. The plaintiff brings this action to recover damages for a failure to perform a contract alleged to have been made on July 6th, a week day, which is substantially the contract claimed by defendant to have been made on Sunday. The defendant denies that any other contract was made except the one on Sunday. The case was tried by a jury, and verdict rendered for the plaintiff. A motion for a new trial is made by the defendant.

W. P. Warner, for plaintiff.

Lamprey & James, for defendant.

NELSON, D. J. Two vital questions were submitted for the determination of the jury:

(1) Was the contract, for breach of which damages are claimed, entered into on Sunday?

(2) If the contract was entered into on Sunday, and void by the laws of Minnesota, was it afterwards reaffirmed on a week day?

The court stated to the jury "that by the laws of Minnesota contracts of a secular character, and which are not works of necessity and charity, if finally consummated on Sunday, are void, and no action can be maintained, either on the contract or for the recovery of whatever may have been done under the contract;" also, "that contracts entered into on Sunday could be reaffirmed afterwards." The case was fairly put to the jury, and the two controlling issues left for them to pass upon.

The counsel for the defendant presented several instructions and requested the court to embrace them in its charge to the jury. They were all, with two exceptions, given in the language of counsel. The language of the other two was changed so as to permit the jury

to consider and determine whether the evidence showed a reaffirmance on a week-day of the contract, in case they should find the agreement was first entered into on Sunday. The court also instructed the jury that the delivery of the cattle was evidence to be considered by them tending to show reaffirmance, as claimed by the plaintiff. Counsel in his brief states that defendant testified that the cattle were delivered under no contract. He is mistaken. The defendant testified that he delivered the cattle under a contract made Sunday, July 4th.

The Vermont supreme court and the later authorities sustain the view taken in respect of the reaffirmance of Sunday contracts, in order, as said by Judge Redfield, to secure parties from fraud and over-reaching practiced on Sunday by those who know their contracts are void and cannot be enforced. *Adams v. Gay*, 19 Vt. 358; *Harrison v. Colton*, 31 Iowa, 16. In this case the evidence showed that the quality of cattle delivered by the defendant was inferior, and not up to the average of the herd he had contracted to deliver.

If the jury had determined the contract was completed and final on Sunday, and there had been no subsequent legal reaffirmance, the law would leave the plaintiff to suffer from his own wrong, and would not aid him; but if the jury came to the conclusion from the evidence that the contract had been reaffirmed on a subsequent week day, it became valid from the date of the reaffirmance, and plaintiff was entitled to recover damages for a breach. His success in such case does not depend on his own violation of law.

The jury sustained the latter view of the case. *Durant v. Rhener*, 26 Minn. 362, does not touch one vital point upon which this case turned, provided the jury came to the conclusion that the contract was affirmed on a week day. In the opinion of the supreme court in that case the conclusion of the referee did not agree with his finding of facts, and the facts as he found them showed in its opinion the agreement was entered into on Sunday, and was so considered by both parties.

There was no evidence in that case tending to show a reaffirmance of the contract by the parties on a subsequent day. The evidence clearly established "the agreement for the formation of a partnership, then and there," on Sunday.

The evidence here tended to show a reaffirmance, and justified the verdict of the jury. Motion denied.

SECOR and others v. TOLEDO, PEORIA & WARSAW R. Co. and others.

(Circuit Court, N. D. Illinois. January 9, 1882.)

1. RAILROADS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

A passenger, on a train that had approached a station and was still moving slowly, stood on the lower step of a car, in the act of stepping to the platform of the station, when, in consequence of the car being moved forward with a jerk, he was thrown upon the platform and injured. *Held*, that he was guilty of contributory negligence in attempting to alight from the train while it was in motion.

On the Intervening Petition of John Rawls.

John Lyle King and Sanders & McKinney, for petitioners.

John M. Jewett and Tenny, Flower & Cratty, for defendants.

DRUMMOND, C. J. The property of the railroad was sold under a decree of the court. Certain funds were paid into court, and upon the reorganization of the company by the purchasers under the sale a bond was filed in court for the purpose of meeting all claims which might be sustained by the court while the property was in the possession of, and operated by, the receiver under its order. This is a petition asking compensation for an injury which the petitioner sustained in consequence of a fall while attempting to get off the train when it was operated by the receiver. On the fifth day of March, 1878, the petitioner took passage on the train at Bushnell, in this state, for Scottsburg. The speed of the train on arriving at Scottsburg station was lessened for the purpose of stopping at that station. While the train was still slowly moving, three passengers left it, reaching the platform at the station in safety; but while the train was still in motion the petitioner went out upon the rear end of the forward car of the train and was standing on the lower step, the train having apparently almost ceased to move; and while he was in the act of stepping from the car to the platform of the station, the car was moved forward with a jerk, in consequence of which the petitioner was suddenly thrown with violence upon the platform of the station and injured.

Admitting these to be the material facts established by the evidence, the question is whether the petitioner is entitled to recover, waiving all other questions which have been made and argued in the case. The principal difficulty in this case arises from what the evidence shows, and in fact what all our experience proves, that the passengers who intend to leave a train at a particular station where

it is expected to stop, as the train slows up and immediately before it actually stops, are in the habit of going out on the platform of the car, and often, as was the fact in this case, leaving the steps of the car. Admitting that there was a sudden jerk of the car, with more or less violence, was there such negligence on the part of the petitioner as to relieve the receiver from all liability in the case? We need make no controversy as to the position of the receiver, or of his liability as such, and may assume, as to the rights of the petitioner, that he stands in the place of the company. We think it must be stated, as a sound proposition in law, that wherever passengers undertake to leave a train under such circumstances as these, before it has actually stopped, they take the risk upon themselves. If they choose to act in accordance with the promptings caused by their own impatience, and to leave the train before it can be done with safety, the risk is theirs. In this case, in addition to the statement that has been made of the actual condition of the petitioner at the time, there is reason to believe that his attention was withdrawn from what he was about to do by conversation with another person, who was then or had just been talking to him.

It has been decided by the supreme court of this state that a passenger has no right to attempt to alight from a train of cars when in motion; and if he undertakes to do so, without the knowledge or direction of any employe of the company, it is at his peril. *O. & M. R. Co. v. Stratton*, 78 Ill. 88; *Ill. Cent. R. Co. v. Slatton*, 54 Ill. 133; *Chi. & Alton R. Co. v. Randolph*, 53 Ill. 510; *Chi. & N. W. R. Co. v. Scates*, 90 Ill. 586.

It would seem to follow, from the proposition just stated, that a railroad passenger cannot recover for any injury caused as this one was, although it may have been occasioned by the combined act of himself in thus attempting to alight from the train, and the jerk of the car. It was his duty not to expose himself to such a contingency, and to remain in the car before thus subjecting himself to danger; and it also follows that those who have the management of a train are not bound to assume that the passengers will attempt to alight from a car until it has actually stopped.

KERTING v. AMERICAN OLEOGRAPH Co. and others.

(Circuit Court, N. D. Illinois. December 23, 1881.)

1. REMOVAL OF CAUSES—MOTION TO REMAND.

A bill was filed in a state court on October 21, 1880, and the cause was at issue and standing for hearing on November 30, 1880. Under the law of the state there was a term of that court held every month, commencing on the third Monday of each month, and the rule of the court in the trial of equity cases was that where any chancery case is at issue, upon notice and motion of either party, a cause, at any time within 10 days of the commencement of a term for which a trial calendar may be ordered made, may be placed on the trial calendar, etc. The cause was placed upon the trial calendar on March 30, 1881, and an application was made to the state court on May 16, 1881, to remove the cause to the circuit court of the United States, when a record of the cause was filed in that court. *Held*, on a motion to remand, that the cause must be remanded to the state court, on the ground that the application for removal was made too late, within the meaning of the third section of the act of congress of 1875.

Motion to Remand.

C. M. Hardy, for complainant.

Conger & Gorten, for defendant.

DRUMMOND, C. J. A motion is made in this case to remand it to the circuit court of Cook county. The bill was filed in that court on the twenty-first of October, 1880, and the process issued in the cause was returned to the November term. Under the law there is a term every month of that court, commencing on the third Monday of each month. The answers were filed to the bill on the sixteenth of November, 1880. On the thirtieth of March, 1881, an order was made by the state court on the application of the plaintiff, and due notice that the cause should be set for hearing for the April term next. On the sixteenth of May, 1881, during the April term, and before the cause was heard, an application was made, under the act of 1875, for the removal of the cause to this court upon the proper petition and bond filed. There was at that time filed in this court a record from the state court; and, some time since, objection was made that the application for removal had not been made in time, which was then held not to be valid, because, by the transcript from the state court, it did not appear that any replication had been filed to the answer, and that the cause was at issue. Since then there has been a supplemental transcript filed from the state court, from which it appears that, after this objection was taken in this court, an application was made to the state

court to file a replication, because a replication had been filed on the thirtieth of November, 1880, which had been lost, or could not be found. The court, upon evidence which it deemed satisfactory, allowed a replication to be filed as of that day. The order of the court is a *nunc pro tunc* order, not in form finding that there was a replication filed on the thirtieth of November; but taking the whole proceedings of the court together, with its order upon this subject, it is clear that the court must have been satisfied that there was a replication filed on that day. It is objected by the defendants seeking a removal that the state court had no right, as this court had obtained jurisdiction of the cause, to make this order; but if it be a fact that the replication was filed on that day, and it was lost or mislaid, there can be no doubt that it was competent for the court, irrespective of the question of removal, to allow the replication to be supplied by a similar paper. This authority the court had under the statute of this state of March 19, 1872, and probably at common law, independent of the statute. It appears that at the time the cause was set down for hearing, and perhaps before that, some search had been made for a replication and none could be found; and the attention of the court was called to the fact that there did not appear to be any replication among the files of the cause. It is not stated at what precise time search was made by the defendants' counsel for the replication and none was found.

The question involved in the cause, then, is whether under these facts the application for a removal was made in time. We must assume that a replication was filed on the thirtieth of November, 1880. Under the statute of the state upon the subject the cause was then to be deemed at issue and standing for hearing. It was competent for either party to call up the cause for hearing upon oral evidence to be taken in court. Under the statute of the state replications are general, and are to be filed within a certain time after the plaintiff or his attorney has been served with notice of answer filed. Consequently, up to the time when the petition for the removal of the cause was filed, there had occurred the November, December, January, February, and March terms of the circuit court of the state. There should be, perhaps, excluded from this list the month of November, as the replication was not filed until the last day of that month. The third section of the act of 1875 requires, in order to remove a suit from a state to the federal court, that the petition for removal must be filed in the state court before or at the term at which the case could be first tried and before the trial thereof. This cause had not

been heard or tried in the state court. Could it have been tried before the April term of the state court? Unless there is some rule of the state court which prevented it from being heard before the April term, then it could hardly be said to be within the contingency named in the statute.

The rule in the state court upon the trial of chancery cases is as follows:

"When any chancery case is at issue, upon notice and motion of either party a cause, at any time within 10 days of the commencement of a term for which a trial calendar may be ordered made, may be placed on the trial calendar. The cases on such calendar shall be called and tried on Tuesday, Wednesday, Thursday, and Friday of each week. No more than five cases shall be fixed for trial on the same day; but if the court is behind in the call of the calendar, not exceeding six cases may be called for trial any one day. All cases shall appear on the calendar in the order of the notice and motion. All cases remaining undisposed of upon any calendar shall, without further order, be placed at the head of the next (new) calendar."

We have already stated that upon the transcript from the state court we must assume that the replication was filed to the answer on the thirtieth of November. It was then competent for either party to place the cause on the trial calendar for the term of December, January, February, or March. It was not, in point of fact, placed upon the trial calendar until the thirtieth of March, but it could have been by the defendants long before that time, as well as by the plaintiff; and it is difficult to understand, therefore, how, under the circumstances of this case, we can say that this application of the sixteenth of May, 1881, for the removal of the cause to this court, was made to the state court before it could there be tried. There certainly can be no inference to that effect drawn from what appears to this court. And the result is that the case must be remanded, on the ground that the application made for removal was too late, within the meaning of the third section of the act of congress of 1875.

STATE OF MISSOURI, etc., v. TIEDERMANN.

(Circuit Court, E. D. Missouri. October, 1881.)

1. BUILDING CONTRACT—PUBLIC BUILDINGS NOT SUBJECT TO MECHANIC'S LIENS
—REMOVAL OF CAUSE—SURETY NOT BOUND BY JUDGMENT AGAINST PRINCIPAL AFTER REMOVAL.

Where the contract of the surety was that his principal should furnish the material and build a public school-house for \$15,000, and suits were brought on claims for mechanics' liens on the building, in which judgments were rendered against the school board and the principal, and the amounts paid upon these liens were in excess of the \$15,000, *held*, the records of these judgments are inadmissible as evidence, for under the law of Missouri there can be no valid mechanics' lien upon a public school building; and the surety was not bound by the adjudications in which the judgments were obtained, because rendered in a state court after he had removed so much of the controversy as was between himself and the plaintiff to the circuit court of the United States under the provisions of the removal act of July 27, 1866, (14 St. at Large, 306.)

MCCRARY, C. J. On the question argued and submitted yesterday I am prepared to announce the conclusion reached by the court. The liability of this defendant is that of a surety only. The contracts of sureties, as we all very well understand, are to be construed strictly in favor of the surety. The contract of this party was, in substance, that his principal should carry out, in good faith, the provisions of the contract for the building of a public school-house. Briefly stated, that contract was that he would furnish the material and build the school-house for \$15,000 within a certain specified time. The present question is whether the surety can be charged as liable, upon his contract of suretyship, for certain claims of mechanics' liens against the public school building, upon which suits were brought, and in which suits judgments were rendered against the school board and against the principal establishing the mechanics' liens. The plaintiff presents here the records of these judgments and offers them in evidence. The amounts paid upon these mechanics' liens was in excess of the \$15,000 for which the building was to have been constructed and completed. The supreme court of Missouri, in the other branch of this case, held that the principal was liable on this account to refund the amount which was paid out by the board to settle these claims which are spoken of here as mechanics' liens. It does not, however, follow that the surety is liable for that to the same extent. The supreme court may have held that, as against the principal, the mechanics' liens were established by an adjudication, and that neither the board of education nor Mr. Diedrich Tiedermann, the principal

on this bond, could question the validity of those judgments; or it may have been of opinion that this was money advanced for the use and benefit of the contractor, the principal, by the school board, and that he ought to be held to refund it. However that may be, the surety was not in court at that time, he was not a party to this proceeding by which the mechanics' liens were established, he was not the contractor, he had not made this indebtedness, and he can only be held upon the ground that it was an indebtedness created in violation of his obligation of suretyship. This can be only held on the ground that it was a valid mechanics' lien established upon the property, because the contractor failed to keep his contract and pay for the material that he used in the construction of the building. The law of Missouri, as established by repeated decisions, is that there can be no such thing as a mechanics' lien upon a public school building. That is the construction of the statute of this state repeatedly adopted by the supreme court of the state, and it is binding upon this court, and it is, in our judgment, perfectly sound, independent of any adjudication. The surety here has a right to raise this question now, for it has never been raised where he was a party; he has a right to say and insist that the school board was not bound, as against him, to pay these claims for mechanics' liens, and that if they did so, so far as he is concerned, it was a voluntary payment of a claim for which he was not liable. Of course, it will not be insisted that the surety upon the bond is liable for an overpayment to the principal. The surety can only be held upon the ground, as I have already said, that this was a valid mechanics' lien upon the school building, which the board was bound to pay for the purpose of protecting their property. As the present defendant has a right now, for the first time, to raise the question whether this was a valid mechanics' lien and an encumbrance upon the school building, and as he has raised it, we feel bound to hold that it was not; that the payment, so far as the surety is concerned, was a voluntary payment. The objection to this evidence must, therefore, be sustained.

Upon reflection I am very clearly of the opinion that this defendant, as surety on the bond, has a right to a settlement of his liability upon his bond under the contract, and is entitled to whatever right he would have had if he had been present at a settlement under the contract at the time that the building was delivered over, or at any other time. The rights that his principal had against this plaintiff under the contract he has a right to avail himself of as a defence in this case, the same as if he had been present and had insisted upon

all his rights at such a settlement. The ruling, therefore, that has already been made in the case is conclusive of this question. The payment of the mechanics' lien claims was outside of and beyond the contract. Perhaps, as between the plaintiff here and the principal on the bond, the plaintiff could pay those claims and charge them to the principal in their settlement with him. At all events, after there was a judgment upon them that concluded them both, they had a right to act upon the hypothesis that they were valid, and that the board was bound to pay them; but we have found, upon investigation, that they were not valid claims, and that their payment did not bind this defendant as surety. I think, therefore, that the objection to the evidence now offered must be sustained.

It will be unnecessary to go into a discussion of the long line of cases upon the general subject of *res adjudicata*, as to how far parties and privies are bound by the judgments of courts of general jurisdiction, because this case is one of a class of its own and stands by itself. The act of congress provides, or did provide—for I think that act is now repealed by the latter act on the subject, and I am very glad that it is—for splitting a case in the state court, and bringing so much of it as constitutes a controversy between citizens of different states in the federal courts. Under that act so much of this controversy as is between the plaintiff and the surety upon the bond has been brought here, while so much of it as is between the plaintiff and the principal upon the bond remained in the state court, and has been tried there. The fundamental principle of this subject is that a party is bound by an adjudication only where he is so far, at least, within the jurisdiction of the court as to be heard in the course of the litigation; he must be a party to the suit or proceeding in such sense as to have a right to appear there, to make motions to the court, to introduce testimony, to cross-examine witnesses, and to take an appeal. Those are the rights which, generally, a party must have in order to be bound by an adjudication. Now, we must assume that this case was properly removed, as I have before said in considering some preliminary questions, and, assuming that, we are bound to say that after removal, the moment the order of removal was made, this defendant passed from the jurisdiction of the state court. He had no right to appear there any further; he had no power to introduce testimony, to make motions, to be heard, or to take an appeal. Besides, as counsel have suggested, the whole purpose of the removal act of 1866 would be defeated by the construction which is contended for by the counsel for the plaintiff. If the party who brings a part of a case

into this court, for the purpose of litigating it here, is bound, nevertheless, by the litigation in the state court, from which he removed it, against some other party, and we are bound by the judgment there, then it follows, of course, that there is no litigation here, and the party who removes the case here does not have any benefit of the removal. It is one of the difficulties which grows out of that very anomalous statute providing for splitting up cases. The best we can do, I think, is to say that the party, having a right to come here, has a right to be heard here upon the merits of his controversy. The adjudication of the state court, I think, is admissible for one purpose, and that is to show the amount of the recovery, in order that the surety may not, in any event, be held for more than the principal; but for the purpose of concluding the defendant upon any other issue, we think it is not admissible.

PULLIAM v. PULLIAM, Ex'r, and others.

(Circuit Court, W. D. Tennessee. April 26, 1879.)

1. EXECUTOR—ACCOUNT AGAINST, BY LEGATEE.

An account against an executor in behalf of a legatee is a matter of course in a court of equity.

2. SAME—STATUTE OF LIMITATIONS NOT A BAR TO REMEDY—RIGHTS NOT BARRED BY LAPSE OF TIME.

The executor being an express trustee, the statutes of limitations do not bar the remedy. Lapse of time, under certain circumstances, does bar the remedy. But where an executor qualified December 6, 1865, and made no settlement until July 19, 1872, because the assets were not collected and the estate not ready for settlement before that time, a bill filed July 7, 1876, was within the strictest rule as to lapse of time, considering the rights of the plaintiff under the will.

3. EQUITY JURISDICTION OF FEDERAL COURTS—NOT AFFECTED BY SETTLEMENTS IN STATE COURTS.

A state statute enacting that settlements made in the county court "shall be *prima facie* evidence in favor of the accounting party," cannot operate to restrict the plenary jurisdiction of the federal courts of equity to enforce the trusts of a will at the suit of a legatee. Those courts will not assume the general administration of the estate, but will require the executor to account *de novo* for the purpose of ascertaining the share due the legatee.

4. POWER OF COURT OVER SETTLED ACCOUNTS—EFFECT OF WANT OF NOTICE OF SETTLEMENTS.

If such a settlement be pleaded as a settled account, the court may, irrespective of any statute, order it to be so taken and to stand before the master as *prima facie* evidence. But this is never done unless it appears that the legatee had notice of the making of the settlement.

5. **PRODUCTION AND PROOF OF ACCOUNTS IN FEDERAL COURTS—EQUITY RULE 79.**

The old mode of proving the account, item by item, has been abolished by equity rule No. 79. If the executor sets up a settlement in the county courts by his answer, and proves it by his deposition, the court will order the master to treat it as presented under that rule.

6. **REQUEST FOR DELAY TO SAVE THE BAR OF THE STATUTES MUST BE SPECIFIC AND TO A PERIOD CERTAIN—WHEN INSUFFICIENT.**

A request by the executor for delay, to save the bar of the statute of limitations of two years and six months in favor of dead men's estates, must be for a definite length of time, agreed on by the parties, or fixed by reference to some designated event which may occur, and thereby render the period certain. A request in writing, made in the following words: "I request that you do not enforce your claims of all descriptions against the estate of John N. Pulliam, by suit or legal proceedings, as the assets of the estate are not yet collected by me sufficient to pay the debts due and owing by John N. Pulliam. By your delaying to sue it shall not prejudice your claims, as I will not avail myself of the statute of limitations applicable to executors, administrators," etc.,—*held* to be insufficient.

7. **WILL—RIGHTS OF CREDITORS.**

A testator cannot, by directing the order of appropriation of the assets, defeat the rights of creditors.

8. **SAME—EXONERATION OF LEGACY—EXECUTOR AS TRUSTEE—WHEN CHARGED PERSONALLY.**

But a testator may exonerate a legacy by charging the debts upon other property in a way that will make the executor a trustee to execute the will, and charge him personally, if he so disregards the directions of the will as to injure the legatee.

9. **SAME—DUTY OF EXECUTOR AS TRUSTEE—AS TO PROPERTY IN OTHER STATE—TITLE TO TRUST PROPERTY—LIABILITY TO LEGATEE FOR VALUE OF PROPERTY NOT ADMINISTERED.**

Where a testator directed his debts to be paid out of his other property, real and personal, in exoneration of a legacy to his wife, granting the necessary powers of sale to his executor, he must execute the trust fully; and if real property be situated in another state, he must execute the will there by doing whatever is necessary for that purpose, if he qualifies in the state of the domicile of the testator. An executor so qualifying has the title of the trust property wherever situated, and he cannot separate the trusts and examine the will in one state, leaving out the others. He becomes personally liable to the legatee if he so executes the trust as to injure her by taking her legacy to pay debts that might have been otherwise paid if he had carried out the will in all its parts. He will be charged in this account with the value of the property not administered as if he had sold it and realized the money.

10. **SAME—LIABILITY OF EXECUTOR IN STATE OF TESTATOR'S DOMICILE—FEDERAL RULE OF EQUITY DECISION AS TO PROPERTY IN OTHER JURISDICTION—UNAFFECTED BY LOCAL STATUTES AND DECISIONS.**

The principle that an executor in the state of testator's domicile becomes, under a will making him testamentary trustee, charged with the trusts of the will, is one of general equity decision, and is wholly unaffected by state statutes and decisions, limiting his liability as *executor* in the state courts in relation to property in another jurisdiction. These local laws may restrict his

powers and limit his liability *qua* executor in that state, but do not affect the equity powers of the federal courts over him as a trustee. The rule is the same in the equity courts of the state of Tennessee.

11. SAME—EXTENT OF LIABILITY OF EXECUTOR AS TRUSTEE.

But an executor neglecting to execute the trusts of a will is not absolutely liable for the legacy to the injured legatee, but only to the extent of what he actually receives, and this will be reached by charging him as if he had sold the property at proper time and received its value, unless there has been supine negligence to charge him further.

12. DEED OF GIFT—DELIVERY, HOW PROVED—HANDWRITING OF DECEASED SUBSCRIBING WITNESS, HOW PROVED.

If a subscribing witness be dead, his handwriting cannot be proved by another subscribing witness, seven years after death of grantor, to establish *delivery* of the deed so as to set it up against a will charging the land with the debts.

13. EVIDENCE—DECLARATIONS OF HUSBAND NOT TO CHARGE WIFE—ACQUIESCENCE BY DURESS.

The declarations of a husband that he had buried a large quantity of gold coin in a place known only to his wife and her brother, do not prove that she appropriated the coin to her own use. The relation of husband and wife will often secure, by duress, acquiescence in the false statements of each other. A cross-bill after his death, by his heirs, will not be sustained on such declarations to charge her with the treasure.

In Equity.

Wright & Folkes, for complainant.

Vance & Anderson, Harris, McKissick & Turley, H. C. Moorman, and Calvin C. Harris, for defendants.

HAMMOND, D. J. This is a bill by the widow of John N. Pulliam, against the executor and the legatees and devisees, for a general account of the administration of the estate, to recover certain legacies and devises made to her, and to charge the executor with certain alleged breaches of his trust.

J. N. Pulliam died in Fayette county, Tennessee, October 20, 1865, leaving a will, in which he gave his wife one section of his lands in Arkansas, "she making her own selection," all the money he might have on hand in her possession at the time of his death, she not being required to give his executors any account of the same, certain specified articles of personal property of which she was to be put into possession at the time of his death, together with all the notes he received of her at her marriage. The will also provided, among other things, that the executors should, after payment of these legacies, pay all the testator's just debts out of the remainder of his estate, the balance of the estate to be equally divided among all his children; and his sons Joel L., John J., and Alfred B. Pulliam were named as executors. The will is dated February 23, 1863. The defendant J. J. Pulliam alone qualified as executor, and only in Tennessee, the other

sons having declined. He took the oath required by the statute, and received letters testamentary on the sixth of December, 1865, filed his inventory on the nineteenth of January, 1866, and his first and final settlement on the nineteenth day of July, 1872.

A decree for an account is a matter of course, and upon the single charge that an executor has proved the will may be founded every inquiry necessary to ascertain the amount of the estate, its value and the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstances leading to the account required. *Desty*, Fed. Proced. Eq. rule 73 and note, p. 303; *Williams, Ex'rs*, 1732; 2 *Daniell*, Ch. Pr. (4th Ed.) 857; *Gresley*, Eq. Ev. 168; *Law v. Hunter*, 1 Russ. 100; *Walker v. Woodward*, Id. 110. And these authorities show that, as to the details of the account, it is improper to introduce proof, except such as may be necessary to settle the principles which are to govern the master, until the cause is before him for that purpose.

In thus proceeding against an executor a court of equity treats him as a trustee for the legatees and devisees to execute the trusts of the will. *Williams, Ex'rs*, 1717. He is an express trustee, and the statutes of limitation do not bar the remedy. *Lafferty v. Turley*, 3 Sneed, 157; *Carr v. Lowe*, 7 Heisk. 85; *Decouche v. Savetier*, 3 Johns. Ch. 190, 215, 222; *Wallis v. Cowell*, 3 Ired. L. 323; *Taylor v. Benham*, 5 How. 233, 276. Lapse of time, however, as in all other cases in equity, will, under certain circumstances, operate as a bar. *Lupton v. Janney*, 13 Pet. 381; *Burton v. Dickinson*, 3 Yerg. 112; *Piatt v. Vattier*, 9 Pet. 416; *McKnight v. Taylor*, 1 How. 161; *Maxwell v. Kennedy*, 8 How. 210; *Boone v. Chiles*, 10 Pet. 177.

The common-law presumption of payment after 20 years furnishes the analogy most frequently applied: this has been reduced to 16 years in Tennessee. *Blackburn v. Squib*, Peck, 60; *Thompson v. Thompson*, 2 Head. 404. But in *Lafferty v. Turley*, *supra*, 27 years was held not to defeat the right to an account in a case like this. In *Burton v. Dickinson*, *supra*, at the stating of the account between the parties those interested were present, received their shares of the property, and executed receipts; and 12 years were, therefore, held to be a bar. So, in *Lupton v. Janney*, *supra*, there being no charge in the bill of any fraud against the executor, it was dismissed, not having been filed until 12 years after the final settlement in the orphan's court. Here the executor made his first and only settlement on July 19, 1872, and this bill was filed July 7, 1876, less than four years after; so that, if we adopt Mr. Justice Story's *dictum* as announced

in *Lupton v. Janney*, that the bill must be filed, at furthest, within the period prescribed by the statute of limitations for actions at law upon matters of account, (though I do not see why this is not an abrogation of the rule that the statute of limitations does not apply to express trustees,) this bill comes within our statute of six years, and is filed in time.

It is true, the plaintiff could have filed this bill at any time after the expiration of the two years allowed the executor by law to settle the estate, (Tenn. Code, § 2311,) and she might possibly have maintained a bill for an account at any time after the six months allowed to ascertain the condition of the estate, (Code, § 2274;) but, considering her rights under this will, she might well delay any demand for an account until the executor had collected the assets and paid the debts, presuming that he would do his duty; and certainly he had no right to require that she should ask for a settlement in a court of equity before he himself considered the estate ready for settlement in a court where, by law, he was bound to settle.

There can be no doubt, therefore, that the plaintiff here is entitled to an account; and our only duty now is to determine, so far as we can, the extent to which it shall go, and the principles that shall guide the master in stating it. *Field v. Holland*, 6 Cranch, 8; *Dubourg v. U. S.* 7 Pet. 625.

And, first, what effect is to be given to the settlement made by the executor with the county court of Fayette county on July 19, 1872, and which was examined and approved by that court at its October term, 1872? It does not appear whether the notice required by section 2298 of the Tennessee Code of the making of this settlement was ever given. The settlement of accounts by executors and administrators is regulated in detail by statute, including a requirement for notice to the parties interested; and section 2305 provides that a settlement, when so made and recorded, shall be *prima facie* evidence in favor of the accounting party. Code, §§ 2295, 2305, and note. The defendant insists that the plaintiff must successfully attack the account by showing errors in it, and only to the extent that she surcharges and falsifies it by such errors can he be required to account again; that this settlement has the verity of a judicial record, and must be here so considered. There is no question but that it has this effect in the state courts wherever the settlement is called in question. This statute is not a mere rule of evidence, but a declaration of the force and effect of the judicial decree in the county court approving the settlement. *Snodgrass v. Snodgrass*, 1 Bax. 161; *Milly*

v. Harrison, 7 Cold. 213; *Curd v. Bonner*, 4 Cold. 632; *Elrod v. Lancaster*, 2 Head, 571; *Turney v. Williams*, 7 Yerg. 172; *Burton v. Dickinson*, 3 Yerg. 112.

Has the general rule of equity jurisprudence, that a legatee or devisee is entitled as a matter of course to an account against an executor on a bill filed for that purpose, been changed by the statute? The jurisdiction does not depend upon the right of a court of equity to surcharge and falsify accounts between individuals for fraud or mistake, or to open settled and stated accounts on like grounds of equitable relief, but attaches from other sources; that is to say, it has been acquired by the assumption on the part of courts of equity of jurisdiction over the assets of deceased persons, and the accounts when taken are mere incidents to the relief. Beyond this it has plenary jurisdiction over these matters which no other court has to administer the trusts of the will. Story, Eq. Jur. § 530 *et seq.*; Toller, Ex'rs, 479, § 4. The jurisdiction of the ordinary to take an account, under the English statutes in force at the time our federal courts were organized, was very much restricted, and out of these restrictions has grown the necessity for equitable relief. Toller, Ex'rs, 489, § 5. I cannot find that in administering this relief courts of equity paid any attention to settlements made in the ecclesiastical court, as such; indeed, I doubt if such settlements as are made in our probate courts under statutes conferring upon them more or less extended jurisdiction, were known to any court at that time other than a court of equity. In case a legatee *elected* to go into the spiritual court the executor was obliged to exhibit an inventory and bring in an account. All legatees and parties interested were cited to appear at the making of the account, for it was not conclusive on such as were absent and had not been cited. Id. 491, 495. After the ordinary had investigated the account, if true and perfect, he pronounced for its validity, and in case all parties interested had been cited such sentence was final, and the executor was subject to no further suit. Id. 495. But the jurisdiction of the ordinary was very limited, and the conclusive nature of the account so made before him applied only to matters within that jurisdiction.

Can this principle be applied to settlements made in our probate courts, so widely differing in their powers and jurisdiction in the several states, to limit and confine the remedial powers of a federal court of equity? It seems to be settled by the Tennessee cases, above cited, that this statute was passed for the very purpose of imposing such a limitation on the state courts. But the jurisdiction of the

federal equity courts cannot be thus controlled by state legislation. In *Mallett v. Dexter*, 1 Curtis, 178, Mr. Justice Curtis treated such a settlement conclusive, on the ground that the state court having first acquired jurisdiction, its adjudication was final and precluded the concurrent jurisdiction of the federal court; and the same doctrine was followed in *Haines v. Carpenter*, 1 Woods, 262. In the latter case it is said that the administration of the estate cannot be, by such a bill, transferred to the federal court, but that its jurisdiction is complete by a full account to ascertain at the suit of a distributee just what his share is. In *Lupton v. Janney*, 13 Pet. 381, Mr. Justice Story says that such settlements, even when made *ex parte*, are *prima facie*, and can only be opened on a bill to surcharge and falsify; but he especially declines to decide whether the jurisdiction of the orphans' court was *exclusive*, and takes care to place his judgment wholly on the ground of lapse of time as a bar. In *Barney v. Saunders*, 16 How. 535, it was held that settlements in the orphans' court could not be *collaterally* attacked, although the trusts under the same will were inquired into. It seems there were two executors; one became administrator *de bonis non*, with the will annexed, and collected *assets*, which he turned over to himself and the co-executor as *trustees*. The court seems to treat the jurisdiction of the orphans' court over the *administration* account as conclusive, and its settlement final. In *Beatty v. Maryland*, 7 Cranch, 281, such a settlement was held not to be evidence, either *prima facie* or otherwise, in a suit at law on the administration bond upon an issue of *devastavit*. Whatever may be found in any of these cases to support the argument that this statute is binding on this court to the extent that the settlement in the county court should be treated as an adjudication in favor of the executor that his disbursements have been proper and his administration lawful, is modified by subsequent cases. It has been repeatedly held that the federal jurisdiction cannot be impaired by the laws of the states which prescribe the modes of redress in their courts. If legal remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation nor restriction by state legislation, and is uniform throughout the different states of the Union. Nor are we confined to the rules of relief prescribed for the equity courts of the state. It is no more competent for this statute to say to this court that the action of the county court shall be

prima facie conclusive, and thus defeat our jurisdiction *pro tanto*, than it would be to say that it should be absolutely conclusive and thus defeat the jurisdiction altogether. *Payne v. Hook*, 7 Wall. 425; *Union Bank of Tennessee v. Jolly*, 18 How. 503; *Suydam v. Broadnax*, 14 Pet. 67; *Yonley v. Lavender*, 21 Wall. 283; *Railway Co. v. Whitton*, 13 Wall. 270, 285; *Hyde v. Stone*, 20 How. 170; *Gaines v. Fuentes*, 92 U. S. 10; *Tate v. Norton*, 94 U. S. 747; *Carter v. Treadwell*, 3 Story, 25, 51.

But while this is true it does not follow that this settlement is to have no effect whatever in taking the account to which the plaintiff is entitled. Irrespective of this statute there is abundant authority for the position that before the master it may be treated, *so far as the court by the decree of reference shall adjudge*, as evidence against the executor to the extent that it contains admissions by him, and in his favor to the extent that it is not shown to be incorrect. There is great conflict of authority as to the exact weight to be given to it, but it is rather a matter of practice in taking the account than a rule of evidence. The earlier cases in Tennessee give such settlements no effect at all. *Greenlee v. Hays*, 1 Tenn. 300; *Bashow v. Blackmore*, Id. 348; *Stephenson v. Yandel*, 5 Hayw. 261, (Cooper's note;) *Stephenson v. Stephenson*, 3 Hayw. 123. The cases since the statute of 1822, above referred to, (Code, § 2305,) have heretofore been noticed. In *Newton v. Poole*, 12 Leigh. 112, 142, it is said that it has long been the rule of our courts to treat these settlements in the probate courts as *prima facie* evidence, and it rests mainly upon the established practice of the country, and a presumption that the accounting officers have done their duty. And see *Nimms v. Com.* 4 Hen. & Munf. 57; *McCall v. Peachy*, 3 Munf. 388, where it is said the executor will not be required to produce here the vouchers he has filed in the county court but may use copies of them. In *Wood v. Barrington*, 1 Dev. Eq. 67, it is said that a settlement by the county court is no way binding on the next of kin. It may and possibly should have some weight in taking the account, particularly where the executor is dead. It is not a stated account. It is possible that the case of *Lupton v. Janney*, 13 Pet. 381, which holds that such an account is *prima facie* evidence, and even our state statute, was intended to go no further than give it the weight which these authorities would seem to authorize without the statute; but the adjudications have extended the operation of the statute further than this, and invested the settlement with the verity of a judicial record. And it is this construction, so much relied on here by the defendant, that trenches

on the jurisdiction of the court. In England the defendant would have been required to set up this account as a *settled* account, whereupon the chancellor would or would not, according to circumstances, treat it as such and so direct the master, who took no notice of it unless the decree so directed, and only so far as he was directed. Where the decree gave it the force of a settled account, it was usual to direct that it should stand *prima facie* conclusive, with liberty to the other party to show any error therein. 2 Daniell, Ch. Pr. (4th Ed.) 1253. In *Everstone v. Tappan*, 5 Johns. Ch. 497, Chancellor Kent ordered an *extrajudicial* account, taken where the parties had notice and were present in a court without jurisdiction, to stand as a settled account, proving itself, except where error was shown.

Under the facts and circumstances of this case, I would not order this account to stand before the master as a settled account, for the reason that it is not shown that the plaintiff had notice, which was always essential. But the old mode of taking accounts before the master, by tediously proving every item, has been abrogated, and the sixty-first rule of the English chancery practice, adopted in 1828, requires the accounting party to state his account in the form of debit and credit, which, being verified by the affidavit of the party, stands as a basis for the account, in which the other party must show error by proof before the master. 2 Daniell, Ch. Pr. 1222. The seventy-ninth equity rule of this court is almost an exact copy of the sixty-first English rule. The defendant, by his deposition, has proved his account as stated in the county court to be correct, and under this rule of the court he could, without any leave of the court, offer it before the master as his account, and it will be so treated now.

By this settlement it appears that there came into the hands of the executor \$26,590.02, which he has paid out. Of these disbursements he paid to his brother, the late Joel L. Pulliam, some \$21,101.15, on 12 notes he held against his father, aggregating, without interest, \$17,659. These notes, which are produced in evidence, bear various dates, from April 21, 1856, to June 2, 1862. The defendants also produce three papers which are called settlements, all in the handwriting of the said Joel L. Pulliam, which it is proved were among the papers of his father. They are dated April 21, 1856, November 18, 1859, and January 1, 1863, and are informal statements of indebtedness, with calculations of interest and credits referring to these notes, and showing how the amounts of the notes are arrived at.

It is alleged in the bill that these notes, or some of them, were paid during the life-time of the father, and that they, with these

statements, were abstracted, by collusion between these brothers, for the purpose of using them as debts to absorb the assets and defeat the provisions of the will in favor of the widow. There has been no proof introduced to sustain this charge, and it is sought to be established solely by circumstantial inferences. The relation between the father and son is sufficient to explain the accumulation of so large an indebtedness, running for such great length of time. The fact that this executor, having paid the outside debts, paid over all this money to his brother on these claims without retaining anything to pay a debt due to himself, or any commissions for himself as executor, together with the other facts relating to the plans adopted to avoid the statute of limitations and protect A. B. Pulliam's land, when taken in connection with the other circumstances, that by this means the notes, which came to the testator by his marriage with this plaintiff, and which, by the will, he has given to her discharged of any liability for debts, have been absorbed in the payment of these claims due Joel L. Pulliam, are sufficient to arouse (considering also the charges made against her by the cross-bill) at least an acute suspicion of unfair dealing between these brothers to defeat her rights under the will; and they justify the defendants in the introduction of proof to sustain their characters against the imputations of the bill. But, after all, the facts show conclusively that this debt from the father to the son did exist, and a court cannot, on these circumstances, override the presumptions arising from the possession of the notes, and infer that men of their high character have abstracted them from their father's papers for a fraudulent purpose. The circumstances show unusual favoritism by the executor for his brother as a creditor, and possibly if this plaintiff had been his own mother she would have had no cause of complaint, for it is much more probable that creditors would have been sacrificed, if sacrifice were necessary.

But there can be no dispute that the plaintiff's notes were assets in the hands of the executor, liable under the law to the payment of debts, in the absence of other assets for the purpose. The proposition suggested in the bill, that the wife could claim them by survivorship, was not seriously pressed at the hearing, and has no support under the facts of the case.

It is conceded by counsel for the plaintiff that the notes of Joel L. Pulliam were not barred, at the time of the testator's death, by the common statute of limitations of six years. This being so, they were good vouchers to the executor, unless barred by the dead man's statute, by which it is provided that all claims against a decedent shall be

demand and paid on suit brought for them within two years and six months from the date of the qualification of the executor. Tenn. Code. § 2279. But there were payments made to Joel L. Pulliam after January 1, 1869, which, owing to a suspension of the statute during the war, is the date of the expiration of the time allowed for payment (*Boothe v. Allen*, 4 Heisk. 258; *Webb v. Bronner*, 11 Heisk. 305) of about \$9,000. This must be disallowed, unless the following paper operates to take the case out of the rule of this statute.

By the Code, "if any creditor, after making demand of his debt or claim, delay to bring suit for a definite time, at the special request of the executor or administrator, the time of such delay shall not be counted in said period of limitation." Code of Tenn. § 2280, and notes. The payments made after the bar attached are sought to be justified by a special request under this statute, and which is as follows:

"To *J. L. Pulliam, Somerville, Tennessee*: In the matter of your claims of all descriptions against the estate of our father, John N. Pulliam, in settlement of which estate I am acting as executor, I request that you do not enforce same by suit or legal proceedings, as the assets of the estate are not yet collected by me sufficient to pay the debts due and owing by John N. Pulliam. By your delaying to sue it shall not prejudice your claims, as I will not avail myself of the statute of limitations applicable to executors, administrators, etc.

"May, 27, 1868.

J. J. PULLIAM."

This request for delay is special, but the question is whether or not the time to be deducted is fixed and definitely ascertained. It is said by the plaintiff there is no demand shown; but the request implies a previous demand. *Puckett v. James*, 2 Humph. 565, 567; *Bank v. Leath*, 11 Humph. 515. The executor is not bound to plead the general statute of limitations, and, if the bar had not attached in the life-time of the decedent, he might waive it. *Batson v. Murrell*, 10 Humph. 301. But there is no such discretion to waive the dead man's statute, and it enures to the benefit of legatees, who may always set it up. *Brown v. Porter*, 7 Humph. 373, 383; *Batson v. Murrell*, *supra*; *Byrn v. Fleming*, 3 Head, 658, 663; *Wharton v. Marberry*, 3 Sneed, 603; *Wooldridge v. Paige*, 1 Memph. L. J. 212; *Woodfin v. Anderson*, 2 Tenn. Ch. 331. In the last case the words were these: "I request that no suit shall be brought on this note, and agree that the statute shall not run against it." *Held*, not good. These are almost the very words of the last clause of the paper be-

fore us, and it is plain they add no force to it, and cannot take the case out of the statute. Does the first clause?

The original act of 1789, chapter 23, § 4, read: "If any creditor, who, after making demand of his debt, shall delay to bring suit, at the special request of the executor or administrator, that then and in that case the said debt or demand shall not be barred during the time of such indulgence." In the case of *Trott v. West*, 9 Yerg, 433; S. C. Meigs, 163, the request was to delay "for a short time," with a promise "to pay soon," accompanied by a partial payment. It was held not to comply with the requirements of this statute, the court saying: "The proviso clearly means that the special request shall stipulate for special delay, for a definite time of indulgence, during which the statute shall not bar the claim." In *Puckett v. James*, 2 Humph. 564, the testator owed a debt for certain land he had purchased, and the executor requested another creditor to delay a debt due him "until the land was paid for," which he agreed to do. The court held that this was for a definite time of indulgence:

"Not, to be sure," says the court, "for a particular *length* of time named in the request, but for the time that might elapse until he could accomplish a certain *event* named and stipulated in the request. There is nothing vague or indefinite in the period here fixed, for, if the land were paid for, the statute would run from that period in the same way that it would if a particular day of a specified year had been named."

By this decision it was first adjudged that the definite time to be deducted may be measured by the occurrence of some *event* agreed upon as the basis of such measurement. In *McWhirter v. Jackson*, 10 Humph. 209, there was this indorsement on the claims: "The within account is accepted, and will be paid when means sufficient come to my hands." The circuit court charged the jury that this was sufficient under the statutes; but on writ of error the supreme court affirmed the judgment solely on the ground that by the promise the administrator had made himself personally liable, having admitted that he had collected money enough to pay the judgment; the court holding that the case was not governed by the act of 1789. In the case of *Bank v. Leath*, 11 Humph. 515, the request made by the executors was that the creditor should not sue "until they could procure a statement of the account between the testator and the bank;" and this was held to be a stated event and sufficient. In *McKizzack v. Smith*, 1 Sneed, 470, the administrator requested delay, and promised to pay "as soon as money enough should be collected;" and at another time, "as soon as Joseph Miller could collect some money." The

court said the case of *Trott v. West*, *supra*, had gone very far in construing the act of 1789 to mean that the request for delay should contain a stipulation for special delay, *for a definite time* of indulgence, and held that the request in the case was as definite as that in *Puckett v. James*, *supra*, and therefore good.

It is to be observed that the doubt here thrown upon the former construction of the act of 1789 has been since set at rest by the Code, which changes the old statute by inserting the words "for a definite time," so that now there can be no doubt on that point. This distinction between the act of 1789 and section 2280 of the Code is noticed in *Birdsong v. Birdsong*, 2 Head, 603, where the rule is stated to be "that the delay agreed upon at the request of the administrator to avoid the bar, must be for a definite time, * * * or to an event which may occur, and thereby render the period certain." A payment of part and a promise to pay the balance was held to be no request at all.

The first reported case after the Code is *Chestnutt v. McBride*, 1 Heisk. 389. The administrator, when requested by the creditor to have his claim settled, said, "Hold on! your claims are good;" and the court, in holding this to be insufficient, said: "It does not show a special request to delay, for a definite time of indulgence, or for any special period that can, by reasonable intendment, be reduced to certainty." In *Cook v. Cook*, 10 Heisk. 464, the court, without deciding the point, intimates plainly that a request "to be patient until I get shut of a big law suit in which I am engaged, and I will go ahead and pay off all claims," was not sufficiently definite. It was held that the creditor must make demand within two years after the time agreed on for delay expires, which was not done in that case. In *Galloway v. Murray*, 1 Tenn. Leg. Rep. 216, there seems to have been in words no special request for delay, and the question was whether one would be implied from the facts. The defendant, in a conversation with the plaintiff on the subject of a settlement, told him "that he wanted to settle the whole matter at once, but did not request any delay." The "clear import," says the court, "of defendant's language was that he would settle as soon as Mrs. Partee came up from Mississippi. No express request for delay was made further than these words import." There was no question about the definiteness of *the time* in this case,—that was sufficiently fixed, under all the cases; the only question being whether there was a *special request for delay*, and it was held there was. The latest case reported is *Langham v. Baker*, 2

Tenn. Leg. Rep. 141. The words of the request do not appear in the report, but the court says:

"Yet it has not been held that a general request for delay from time to time, or an assurance that the debt is good, will save the operation of the statute of two years. Such were the requests in this case; and when the statute is complete it is a *devastavit* in the executor or administrator to pay such barred debt for which he will be held liable."

These are all the cases on this particular subject of the definiteness of the time, but there are others illustrating the rigidity with which the courts adhere to these statutes to protect dead men's estates. Although the common statute does not run against a distributee, the administrator being an express trustee, yet, if the administrator die, this statute of two years attaches in favor of his representatives; the administrator is himself bound by it, as to his own debt, and must pay himself within the two years by settling with the clerk and having his debt allowed; and the state is itself barred by it, even for taxes, which is not so as to the other statutes of limitation. *Galloway v. Murray*, *supra*; *Brown v. Porter*, 7 Humph. 373; *Hamner v. Hamner*, 3 Head, 398; *Byrn v. Fleming*, Id. 658; *State v. Crutcher*, 2 Swan, 514. The Massachusetts cases under a similar statute, referred to in *Trott v. West*, *supra*, are to the same effect. *Dawes v. Shed*, 15 Mass. 6; *Waltham Bank v. Wright*, 8 Allen, 121; *Jenney v. Wilcox*, 9 Allen, 246; *Bradford v. Forbes*, Id. 365; *Wells v. Child*, 12 Allen, 333.

Having gone over these cases with the utmost care, I am of the opinion that the paper offered in evidence here does not show that any definite time was agreed upon for the duration of the delay, and that it is impossible to say from it, by reference to any event, how long the delay should continue. He gives as his reason for asking delay the fact that he had not yet collected assets to pay the debts of the testator. If any implication can possibly be based on the language of this paper, it is that the collection of sufficient assets to pay *all* the debts of the testator is the *event* which is to fix the duration of the time of indulgence. This may never happen, and according to the position taken by the defendants has not yet happened, now quite eleven years from the date of this paper. It was apparent to these defendants—on their theory of this case, that the executor had nothing to do with the real estate—then, as now, that this event would never happen. The fatal defect of this paper, in this regard, is too obvious to require further consideration.

It was suggested that the proof shows that there were then pending

suits on the notes which came into the hands of the executor, and that it was the end of these suits to which the parties obviously looked as the duration of the delay. This paper does not say so; the parties have reduced their contracts for delay to writing, and we cannot look beyond it, nor imply anything in its favor, not necessarily implied from the language of it. In *Galloway v. Murray, supra*, the learned judge, in delivering the opinion, says:

"It is manifest from the decisions that there has been a departure from the strict letter of the statute in order to administer it in its spirit, and to meet the right and justice of the cases as they may arise. The statute was never intended as a snare by which to entrap the unwary and credulous creditor, and when such a case is presented, if clearly within the equity of the statute, no refined and technical construction should be allowed to defeat the right. After the administrator has negotiated for delay and obtained it, with or without a special verbal request, *and the effect of it has been to paralyze the vigilance of the creditor*, and the administrator seeks advantage of his own wrong, certainly the statute must be held to protect the creditor and save the bar. In such case we hold the spirit of the law is answered."

This doctrine is urged in the argument here, but it does not apply. Such a case is not presented by this record. This creditor can make no pretence of having been paralyzed by this transaction or by this executor. This paper is in the handwriting of Joel L. Pulliam. He is proved to have been an eminent and able lawyer, familiar with the administration of estates, and capable of taking care of himself; and the executor was his brother, acting under his guidance and in his interest.

We come now to the determination of the rights of the plaintiff under the will, as against the executor, in relation to the notes the testator received of her at their marriage, and other property bequeathed to her. Of course the plaintiff must take all the property subject to the rights of creditors, it being impossible for the testator to give his property to his wife, exempt from liability to them, whatever power he had to direct the order in which the property should be liable. Wills of both real and personal property, in the United States, are made subject to the rights of creditors; and to the extent that it is necessary to appropriate the property to the satisfaction of their demands the intended bounty is defeated. 2 Cooley's Black. Com. 378, note 10. This is a matter to be determined upon the taking of the account, and the executor is liable only so far as assets have come or should have come into his hands sufficient to pay these bequests to the wife after the payment of all debts, for the payment of which he shall be allowed in the settlement.

It is conceded that two of the notes collected by the executor—that of Locke & Abbott for \$1,735.49, and that of John L. Parham for \$7,702.66—were received by the testator from the plaintiff (or her mother for her) at his marriage, and that they are the notes mentioned in the will; while, on the other hand, it is conceded by the plaintiff that the S. R. Carney note for \$5,335.83 was not so received. But the point is made that the Locke & Abbott note having been renewed by the testator in his own name, instead of that of the plaintiff or her mother, as it originally stood, it is taken out of the category and does not pass by the bequest. I think the testator intended it should, and that the intention is plain; otherwise, there being only two, he would not have used the plural. Taking it in his own name was a reduction to possession, and would defeat the wife's survivorship; but it nowhere appears that he intended the bequests to be limited to such notes as would have survived to her. His language is: "I further will to her all of the notes I received of her at our marriage, of which I have collected but a small amount." This is plain and unambiguous.

The master, in taking the account, will therefore allow her these two and other notes which she may show came to the testator by his marriage with the plaintiff and were collected by the executor. If the judgment against E. S. and Darling Allen for \$250, mentioned in the settlement, was on a note coming by the marriage, it will also be allowed. The Carney note will not be allowed, as she proves no claim to it. The specific articles of personal property will be allowed to her, unless it is shown either that they did not come into the hands of the executor, were necessarily absorbed in the payment of debts, or that she has received them. He will be credited with all she received.

As to the \$10,000 of money admitted to be in her possession at the time of the testator's death, the will gives it to her in the plainest terms. It may have been assets for creditors on failure of all other resources, but it was not her duty to surrender it to the executor. No creditors are here asking to have it applied to their debts, and the executor, as to the creditors, has settled his accounts and been discharged; nor does it appear that there are any creditors unpaid not barred by the statute of limitations.

The next question to be determined is that relating to the real estate. It appears that the testator had a quantity of land in Arkansas and some in Tennessee. It is not denied, and cannot be, that this will charges the debts of the testator upon all the other

property, real and personal, in exoneration of the legacies given to the plaintiff; and the defendants concede that as to any property remaining after the payment of the debts owed by the testator at his death, the plaintiff can be subrogated to the rights of creditors who have been paid with her money, and may now subject such other property to the payment of her legacies. *Alexander v. Miller*, 7 Heisk. 65. And they say this is all the equity she has under this will. She claims it was the duty of the *executor* to execute this will by selling the lands to raise a fund to pay the debts, and, not having done so, he has committed a fraudulent breach of trust, and is now liable to her absolutely for the value of her legacies, and she asks for a personal decree against him to satisfy her claim, and this without reference to the value of the lands. The executor insists that the will does not give him any power to sell the real estate in Tennessee or Arkansas, either expressly or impliedly, and that he had only the ordinary remedy of an executor to sell lands where the estate is insolvent or the personal assets insufficient under our act of 1827. Tenn. Code, 2267, 2326, 2362. In *Alexander v. Miller*, 7 Heisk. 65, 77, the supreme court of Tennessee holds that where there is no power or authority conferred by the will to sell real estate the executor can sell no portion of it, nor apply it to the payment of debts; and, while the general rule is that the personal estate is primarily liable to the payment of debts, if it is exonerated by the express terms of the will, or by implication, a different rule applies. The policy of the law is to give effect to all the provisions of the will—those in favor of legatees as well as those in favor of devisees; and where the real estate is charged with neither debts nor legacies by the will, but descends to the heir at law, a court of equity will marshal the assets in favor of specific legacies of personalty and substitute the legatee in place of the creditor. But it is plain from this case that where the will, by express terms or impliedly, confers power on the executor to sell the lands for the exoneration of the legatees, it is not necessary to resort to this equity of subrogation, for in such case the executor may do, under the powers of the will, what otherwise could only be done by a resort to this equity of subrogation. In *Dunn v. Keeling*, 2 Dev. L. 283, it was held that the words “after all my just debts are discharged,” attached to a devise of real estate, do not confer a power on the executor to sell. But this will goes further than that, and does not depend for the implication of a power to sell upon such barren words as those above quoted. The words here are: “Everything I have named and given to my wife she is to have and do as

she pleases with; none of my children is to put any claim to the same, nor any other person. I further will and say, the next item, after carrying out all I have named above, is that my executors shall pay all of my just debts out of the remainder of my estate, and then make Alfred and Rachel equal," etc. Then, after appointing his three sons executors, without security, he says he wishes "that all of my business shall be settled without being recorded or going into the court-house." Taking the whole will together, it can scarcely be doubted that it was the intention of the testator to confer ample powers upon his executors to carry out this will, by selling the real estate, if necessary, to pay his debts, in exoneration of the particular legacies to his wife. That he had his lands in mind is plain, for he had given his wife choice of one section of the Arkansas lands; and after the above-quoted direction to pay his debts out of the remainder of his estate, he directs how the Isbell plantation shall go to Alfred, and be accounted for by him. The word "estate," unqualified or restricted, is always construed to embrace every description of property, real, personal, and mixed. *Gourley v. Thompson*, 2 Sneed, 386, 393; *Brown v. Crawford*, 9 Humph. 164; *Archer v. De-neale*, 1 Pet. 585; *Lewis v. Darling*, 16 How. 1. It was held in *Williams v. Otey*, 8 Humph. 563, that where property was conveyed by deed in trust to pay debts there was a necessary implication of power to sell in the trustee; and the authorities are explicit that where a will gives the power to sell land, if necessary or advisable, during the course of administration, it belongs by implication to the executor. *Chandler v. Rider*, 102 Mass. 269; *Peter v. Beverly*, 10 Pet. 532; *Bank v. Beverly*, 1 How. 134; *Fenwick v. Chapman*, 9 Pet. 461; *Taylor v. Benham*, 5 How. 233; *Robertson v. Gaines*, 2 Humph. 366; *Lockart v. Northington*, 1 Sneed, 317; *Porter v. Greer*, 1 Cold. 568; *Queener v. Trew*, 6 Heisk. 59, 61; *Green v. Davidson*, 4 Bax. 488. The case of *Queener v. Trew*, *supra*, states the rule to be that not only will the executor be designated by implication as the donee to execute an express power of sale, but the power of sale itself will be implied from the nature and character of the requirements of the will, where it is manifest that the purposes of the testator cannot be carried out without a sale; and such is undoubtedly the law. It is argued for the plaintiff that under the laws of Arkansas the executor could have sold the lands there without probating the will, or by probating it simply without taking out letters, and that under this will he might have maintained ejectment. It was decided in *Peck v. Henderson*, 7 Yerg. 18, that a mere power to sell for the payment of debts

did not break the descent to the heirs, nor confer such title on the executor as would enable him to maintain ejectment. But if the executor assumed the burden of executing this will in Arkansas by his qualification in Tennessee, he was, by all the authorities, bound to do whatever was necessary under the laws of Arkansas to effectuate his power of sale, and convert the lands into money for the payment of debts. It is not pretended that he has done anything as respects the land, and he concedes that whatever was imposed upon him in this regard has been wholly neglected. What, then, was the legal effect of his qualification as executor in Tennessee alone?

This was the domicile of the testator, and the administration in chief was here; all other administrations were ancillary to this. The administrator or executor at the domicile may always lawfully receive and give acquittances for assets in another state. *Wilkins v. Ellett*, 9 Wall. 740; *Trecothick v. Austin*, 4 Mason, 16, 32; *Swatzel v. Arnold*, 1 Woolw. 384, 389. In the last case it is said by Mr. Justice Miller that the impediment to the exercise of full powers, even by an administrator, in a jurisdiction foreign to that of granting his letters, is essentially technical and formal, and should not be strained beyond its necessary application. The supreme court of Tennessee says in *Young v. O'Neal*, 3 Sneed, 55, that "as an executor or administrator has no authority to sue for or collect the assets of which the deceased may have died possessed in a foreign country, the law does not impose on him the duty of doing so. He has no title to or authority over the assets in another state; neither is he responsible therefor." And it was held that a voluntary payment to a foreign administrator was not good. But in *Wilkins v. Ellett*, *supra*, the supreme court of the United States repudiates that doctrine, and holds that "the original administrator, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased for the purpose of converting the effects of the estate, paying the debts, and making distribution of the residue, according to the law of the place or directions of the will, as the case may be. * * * The difficulty does not lie in any defect of title to the possession, but in the limitation or qualification of the general principles, in respect to personal property, founded upon the policy of the foreign country, to protect home creditors." Now, it is just as competent for a testator to convert his lands into personalty by will, and invest his executor with the duty of so administering it, as it is for the law to confer upon an administrator the title to personalty in a foreign jurisdiction. Lands charged with the payment of debts are always considered per-

sonalty. *Craig v. Leslie*, 3 Wheat. 563; *Cropley v. Cooper*, 19 Wall. 174; *Peter v. Beverly*, 10 Pet. 532. But, treating it as real property, where a will devises either a power or an estate in lands, the devisee, whether he take as executor or otherwise, takes title under the will and not by virtue of letters testamentary. These are only the evidence that he is executor, and do not add to his title or estate. Therefore, the principle of *Wilkins v. Ellett*, *supra*, will apply to lands in a foreign jurisdiction, when the will devises them, just as well as to personalty, provided, always, that the will is in conformity to the law of the place where the land lies. And this doctrine, that because executors cannot sue for or recover assets in a foreign jurisdiction the law imposes no duty on them, and they cannot be called to account for such assets, has always been limited to suits about matters pertaining to their official character, and is generally invoked only to protect other persons and their rights, such as suits on their bonds, creditors, purchasers, and the like, and never to protect them against a breach of trust; and they may and often do occupy two relations: that of executors, in the sense that they are the *representatives* of the deceased, and that of trustees for the parties entitled to the funds coming into their hands, or to the property with which they have been vested for the purposes of the trust. And in their capacity of trustees they are often held liable in a court of equity both for assets received and breaches of trust, in relation to assets in a foreign jurisdiction and to matters not coming within the scope of their liability as executors. For example, they are liable *as executors* only for *legal assets*, nor can their sureties be liable beyond that; but a court of equity will, nevertheless, hold them to account for equitable assets and all breaches of trust whatever. Their liability as executors is frequently limited or enlarged by statutes regulating the administration of estates; but such statutes do not necessarily affect the equity powers of the federal courts. Hence, in determining a question like this, we do not consider state statutes, nor state decisions, further than they furnish rules of property to be enforced, or rules of evidence to guide in the ascertainment of facts. The probate of a will and the appointment of an executor being exclusively within the jurisdiction of the state courts, we are concluded by his letters as evidence of his official character, and the judgment of the probate court, whether the instrument be a will or not; but the will being proven, and the executor appointed, the proper construction of the rights, duties, and powers of the executor, under the will, are not authoritatively controlled by either state statutes or state decisions.

So that, if the construction placed by the learned counsel for defendants on these statutes and decisions warrants the position that, by accepting the execution of the will only in Tennessee, the executor had no authority to sue for or collect the assets in a foreign country, and no duty imposed upon him to do so, it does not follow that the same rule will prevail here. But I do not think the decisions in Tennessee, properly considered, maintain the position. *Swancy v. Scott*, 9 Humph. 326, determined that the residence of a *debtor* is the *situs* of the debt, and the administrator of that *situs* was the proper party to collect it, notwithstanding the evidence of the debt was a judgment in another state. It did not appear that there was any administration in the domicile of the judgment plaintiff, Kentucky; and it was not decided what would have been the rights of such domiciliary administrator except that he could not have sued in Tennessee without taking out letters here. This was so, because Tennessee had not authorized a foreign administrator to sue in her courts, and by statute had authorized and required a local administration in such cases. But it does not follow because an executor may not sue in a foreign jurisdiction, without taking out letters testamentary, he has no duty imposed upon him to take out letters or do whatever the local law requires, to give effect to the title he has acquired by the will. His designation in the will as the choice of the testator for that trust imposed upon this executor the duty of taking out letters in Tennessee, and it was this designation that gave him the right to take out letters. And the same designation evidently imposes the same duty as to property situated in Arkansas, not because he has taken out letters in Tennessee, but because he has assumed the trust of execution. The qualification in Tennessee is the manifestation of his acceptance of the trust imposed upon him to execute this will, unless he can accept part and decline part; select such duties as are agreeable to him, like those of collecting the notes given to the widow, and paying the proceeds to his brother, as a creditor, and refuse such as are disagreeable to him, like those of subjecting the assets first to the payment of debts.

It is manifest that the testator did not contemplate such a disastrous separation of these trusts, and that the will does not readily accommodate itself to such an arrangement. It is almost absolutely essential to the rights of this plaintiff that the same person should have the execution of the will everywhere; and no just man, when he came to consider whether he should accept this trust, would for a moment have hesitated to decline, if he supposed at the time that by

abdicated his powers over the Arkansas land the result would be to defeat the intention of the testator to have it applied first to the payment of his debts in exoneration of this legacy. The solicitude of the testator that this should be done by his executors, named in the will, is so apparent that no one who intended to execute *the will* rather than control the assets should have failed to see that to accomplish that intention would be the first duty of an executor, and that a failure to accept the whole trust would almost necessarily defeat that purpose of the testator. A trustee cannot separate the trusts—accept part and decline part: the acceptance of any part is the acceptance of the whole. Perry, Trusts, § 264 *et seq.* Where an executor is also trustee of the real estate, he cannot desert the situation of trustee and accept that of executor. By acting as executor he is liable in both characters; the taking of probate is an acceptance of the whole trust. *Ward v. Butler*, 2 Molloy, 533; *Mucklow v. Fuller*, 1 Jacob, 198, 201; *Worth v. McAdam*, 1 Dev. & Bat. L. 199, 209. The Tennessee cases cited in argument (*Snodgrass v. Snodgrass*, 1 Bax. 163; *Gilchrist v. Cannon*, 1 Cold. 587; *Keaton v. Campbell*, 2 Humph. 224; *Martin v. Peck*, 2 Yerg. 297; *Peck v. Henderson*, 7 Yerg. 18; *Peck v. Peck*, 9 Yerg. 300; *Allsup v. Allsup*, 10 Yerg. 284; and *Hughlett v. Hughlett*, 5 Humph. 452,) do not support the position that one named in the will as executor can choose to qualify in Tennessee, and decline to qualify elsewhere, and thereby separate the trusts. They go to the extent of holding that, if this executor had given bonds, his surety would not be liable for any of his breaches of trust as to the Arkansas assets, and that the probate court would have no jurisdiction to charge him in the settlement of his accounts as executor with them, nor the law courts to charge him as for a *devastavit* concerning them; but not that a court of equity may not compel a full and complete execution of all the trusts of the will; and that a court of equity will enforce such an execution of the trusts finds abundant support in these cases, when taken in connection with other adjudications: *Andrews v. Andrews*, 7 Heisk. 234; *Williams v. Bradley*, Id. 55; *Milly v. Harrison*, 7 Cold. 191; *Hubbard v. Epps*, 1 Tenn. Leg. Rep. 320; *Drane v. Bayliss*, 1 Humph. 187; *Deaderick v. Cantrell*, 10 Yerg. 263; *Lafferty v. Turley*, 3 Sneed, 157. See, also, *Schultze v. Pulver*, 3 Wend. 363, and *Re Butler*, 38 N. Y. 397, which hold that the executor must go into another state and qualify, when necessary to execute the trusts of the will. By sections 2221 and 4069 of the Tennessee Code the executor takes an oath that he will perform the will of the testator.

But, whatever the rule in a Tennessee court of equity, there can be no doubt in the federal courts that the will is the executor's law, and its trusts are all binding on him. *Lewis v. McFarland*, 9 Cranch, 151; *Potter v. Gardner*, 12 Wheat. 498; *Boyce v. Grundy*, 9 Pet. 275; *Fenwick v. Chapman*, Id. 461; *Peter v. Beverly*, 10 Pet. 532; *Bank of U. S. v. Beverly*, 1 How. 134; *Taylor v. Benham*, 5 How. 233; *Lewis v. Darling*, 16 How. 1; *Vaughn v. Northrop*, 15 Pet. 1. The argument is made that the creditors, not being bound by the order of appropriation of assets made in the will, could have subjected these notes to their debts, and that this executor has only done what by law he could have been compelled to do, and therefore has wronged no one. It may be doubted on the foregoing authorities whether the creditors could do this to the injury of the plaintiff, and there are many expressions by the supreme court of the United States in these cases that would justify the holding that even creditors can be controlled in their rights to the personalty by forcing them to exonerate the one fund to which this plaintiff must look for her satisfaction. But creditors took no steps to obstruct the intention of the testator. They did not set up any claim of this kind, and did not force the executor to disobey the will. His duty was to execute it according to its terms. He need not pay the legacy until he knows it will not be needed to pay debts; but he has no authority to change the order of appropriation mentioned in the will. The creditors could take care of themselves.

In *Gaines v. New Orleans*, 6 Wall. 642, 713, the purchasers of the testator's land sought to protect their title by showing that creditors were entitled to it under the administration laws, but the court says "they cannot substitute themselves for the creditors of the estate and use them as a means to get protection." The same principle applies here. This executor cannot protect himself against a breach of trust by showing that creditors had remedies against the trust which they did not set up. The law imposed on him an impartial administration of his trust.

I am therefore of the opinion that the defendant J. J. Pulliam is liable to the plaintiff for a failure to sell the lands in Arkansas under the powers granted to him by the will for that purpose, in order that he might exonerate her legacy by applying the lands first to the payment of the debts.

The extent of his liability will be now considered. By this will the lands were converted into personalty for the payment of debts, and are to be regarded, for all the purposes of this case, as money at the

time of the testator's death. Equity regards that as done which is required to be done. *Cropley v. Cooper*, 19 Wall. 167, 174; *Craig v. Leslie*, 3 Wheat. 563; *Given v. Hilton*, 95 U. S. 591. In *Taylor v. Benham*, 5 How. 233, the case was somewhat like this: A South Carolina executor was charged by bill in Alabama for money received by the sale of lands in Kentucky, and the court would have charged him for the land in Kentucky not sold but for the fact that the legatees had intermeddled with him by appointing other agents to sell, and for other circumstances. The rule is there laid down that a trustee is not liable for more than he actually receives, except "in cases of very supine negligence or wilful default." If this executor had sold these lands at the time he should have done, he would have realized their value; and he will be treated here and charged in the account just as if he had done his duty. *Hill, Trustees*, 522, 523, and cases cited. The plaintiff cannot ask more than his proper diligence would have produced. There should be no penalty affixed to him like charging him absolutely with plaintiff's legacy. He is not bound to her unless all the assets he could have realized were sufficient to pay the lawful debts and her legacy. The master will be therefore directed to charge the executor with the value of these Arkansas lands, and he will find the highest value at any time from six months after the date of his qualification (which time the law allowed him to ascertain the condition of the estate: *Tenn. Code*, § 2274) to the end of the two years he was allowed to settle the estate. *Code of Tenn.* § 2295. He certainly should have sold the lands within this period to have been diligent, and the highest value is all that should be charged against him.

But the plaintiff had specifically devised to her one section of the Arkansas lands, she making her own selection out of all the lands in that state. This selection she has never made, and it is argued that the executor is not chargeable, because, until she does select, he cannot sell. This might do if the executor had shown that his efforts to execute the will had been impeded by her failure to select. But he repudiated all obligations on himself in relation to these lands, and cannot complain that she made no selection, and his liability cannot be excused on this ground; but he is not liable for the section devised to her. It is to be presumed that if the executor had proceeded to discharge his trust she would have selected the most valuable section of all the lands, and equity will treat this as having been already done. The master will therefore ascertain the value by sections, and deduct from the whole value that of the best section, and charge the

executor only with the residue. And the plaintiff may now select one section, the title to be secured to her by conveyance from the defendants according to the practice of the court. *Boyce v. Grundy*, *supra*; *Lewis v. Darling*, *supra*; *Hickey v. Stewart*, 3 How. 750; *Watts v. Waddelle*, 6 Pet. 389; S. C. 1 McLean, 200; *Watkins v. Holman*, 16 Pet. 26.

By this will the testator bequeathed to Alfred B. Pulliam his Isbell plantation, valued at \$6,000, to be taken into account as part of his estate received from the testator. It is claimed by the plaintiff that this land is also charged under the will with the debts of the estate in exoneration of her legacy. This is undoubtedly true, and in that respect it occupies no other attitude than does the Arkansas land, and its value must be charged against the executor in the same way. The fact that it is specifically devised does not relieve it from the burden put upon it by the testator in favor of the plaintiff. By such devise an equity is no doubt created that this land shall not be touched for debts until all the other property has been exhausted. *Darden v. Hatcher*, 1 Cold. 513. Nor does the statute of limitations protect the land. He held it under the will and is bound by its trusts. It may be that, as between him and the executor, the statutes of limitation would protect the land against the exercise of the power of sale for debts, but the equities between these devisees is not of that character which is barred by the statute of limitations. As against the executor the plaintiff has a right to an account, charging him with the value of the land just as if he had sold it to the best advantage in the execution of his trust.

But it appears by a paper offered as proof that on the twenty-second day of June, 1863, subsequent to the date of the will, the testator by deed of gift, in consideration of love and affection, conveyed an undivided half of the Isbell plantation to Alfred B. Pulliam, to whom the will devises the whole. Alfred B. Pulliam says in his answer that he went into possession soon after his father died, and has been in possession ever since. It is manifest, then, that he did not go into possession under the deed, at least until after his father's death. He also says in his answer that he acquired by deed of gift from his father one-half of said land, the deed being made in 1863, and being of record. This answer was filed in July, 1877. It does not exhibit the deed, nor is it proved or produced otherwise than by its production by his counsel at the hearing. It is said in the answer that it was registered as required by law. It appears by the certificates upon it that on the twentieth of July, 1872, the day after the final settlement of the executor was filed in the county court, and

when it was apparent that his land might be needed to answer the trusts of the will, this deed of gift was proved by Joel L. Pulliam, one of the subscribing witnesses to it, who states that he signed the name of the other witness, and saw him make his mark, the said other witness being then dead, and on this proof the deed is registered. This proving of the deed took place nearly seven years after the death of the testator, and there is no explanation found in the answers or in the proof of any of these circumstances; and the possession of this paper from the time of its execution till now is not shown to have been in Alfred B. Pulliam, except by the production of it by his counsel at the argument of this case. Its *delivery* is proved in no other way than by the statement of Joel L. Pulliam, one of the subscribing witnesses, before the clerk authorized to take proof of deeds, that the testator acknowledged the instrument, in his presence, to be his act and deed, for the purposes therein contained. This would be sufficient, ordinarily; but it seems to me, under the circumstances of this case, nearly seven years after the death of the grantor, these parties should have shown something in explanation of the long delay in proving this instrument for registration, if it had been duly delivered and relied on as a muniment of title, particularly where it is admitted that possession of the land did not accompany the deed. The registration of it does not prove it, for it has not been proven and registered according to law. Joel L. Pulliam, the subscribing witness, was not competent to prove the signature of the other witness, (in this case written by himself and signed with a mark.) The Code of Tennessee, § 2055, enacts that "if all the subscribing witnesses be dead, * * * except one, he may prove the execution of the instrument before the clerk or deputy clerk of the county court, the handwriting of the other person being proved *by some other person*;" and the act of 1869, c. 122, § 1, (Code, 2055a,) requires that the proof of the handwriting of the deceased subscribing witnesses shall be by *two persons* acquainted with his handwriting. It is, therefore, plain that this deed is not admissible in evidence and must be excluded. This view of the case renders it unnecessary to inquire as to the effect of a deed of gift granting the land after the date of a will devising it; or whether the devisee, if he takes part under the will, must be held to take the whole under it.

It further appears, in reference to this Isbell plantation, that the testator and Joel L. Pulliam originally purchased it jointly, each owning an undivided half. The deed to them is dated June 30, 1856, and conveys the land absolutely for \$4,400, acknowledged to be paid.

On the eleventh day of March, 1858, Joel L. Pulliam, by deed, conveyed absolutely to his father an undivided one-half of the land for the consideration of \$2,200 to him "in hand paid, and balance to be paid." A paper called an obligation, also dated March 11, 1858, signed by John N. Pulliam, is also introduced in evidence, by which it appears that the two purchasers from Isbell executed in payment of the purchase money their four bonds for \$1,100 each, payable respectively December 25, 1857, 1858, 1859, and 1860; that J. N. Pulliam had paid the first of these bonds, and by this instrument obligates himself to pay the others; and, in consideration of his having paid the first bond and binding himself to pay the others, the deed by Joel L. Pulliam to his father was made. This paper is not registered; neither it nor the deed reserves any lien on the land to secure the performance of this obligation; neither does the deed from Isbell to them reserve any lien. It is claimed in the answers and said in the depositions that the testator did not fully pay for the land, and that at the time he died the encumbrance for the unpaid purchase money was greater than the value of the land. This fact is sought to be established by inferences as to the value of the land drawn from the consideration mentioned in the deeds; for the parties have not seen fit to prove its value, nor the exact amount of the unpaid purchase money. It is said in argument (though the facts are not proved in the record) that the alleged lien for the purchase money was foreclosed,—how, does not appear,—and that the land was purchased by Joel L. Pulliam, and by him conveyed to Alfred's children.

The theory of the defendants is that Alfred B. Pulliam took one undivided half of the land *under the deed of gift*, discharged of all liability for the purchase money due; that he took the other half under the will subject to an encumbrance for the whole of the purchase money, and because there would be nothing left after paying the encumbrance, the executor had no duty to perform, and is not to be charged with anything on account of this land. But it does not legally appear here that Alfred had any deed of gift; and, if it had taken effect, it is questionable whether he could claim that half discharged of its liability for the purchase money as against his co-devisees. It was the executor's duty to sell this land for the payment of debts. If the debt for the purchase money was a valid and subsisting one, not barred by the statute of limitations, he could have paid it, and it was his duty to pay it, and he would be entitled to credit in his accounts for the amount paid. If the debt became barred by the

two years and six months' statute, the bar enured to the benefit of the devisees and legatees under this will; and if not paid or sued for within the time it was forever barred in law or equity by the express language of the statute. If Joel L. or Alfred B. Pulliam has paid off this encumbrance it is not shown by this record. They could not by such payment create against the plaintiff any debt or obligation to refund them the money, or indeed any equity, except the right to be subrogated to whatever claim the original creditor had against the estate, nor could they, as against the executor, enlarge the rights of the original creditor.

If the creditor within the two years and six months had filed a bill to enforce his lien, and it were in fact a valid and subsisting lien for a debt due by the testator, and by the proceedings the executor was divested of his title in the land, or the devisees became divested of their title, so that the executor could not execute his power of sale, then he would be discharged from any further liability as to the land, unless it could be shown that by neglecting to sell and pay off the encumbrance the plaintiff had been sacrificed. But he sets up no such defence, his theory being that as executor he had nothing to do with the land. But he should have defended against any encumbrance, if invalid, and defeated it; if valid, he should have paid it, if his accounts show that he had assets for the purpose or could have raised a fund by the sale of property.

I cannot say from this record whether Isbell had a debt against the testator. None is proven, nor are the bonds produced, nor is there any proof that they were a lien on the land or valid. It does appear by the recitals in the obligation of March 11, 1858, that J. J. Pulliam was a surety on the purchase-money notes; if this be so, it is possible there was not even an equitable vendor's lien. I think, in taking an account like this, the defendant may before the master prove any fact which will excuse him from liability, and he may therefore make such proof as he may be able on this subject of the encumbrance and the master will report the facts. He will, however, charge the executor with the full value of the whole land, as already directed in the matter of the lands in Arkansas, and report the facts as to this alleged debt to Isbell, and the alleged encumbrance, and the present condition of the title and ownership of the Isbell plantation.

The question of the post-nuptial contract of October 20, 1860, arising on the original bill, does not seem to me to be a practical one. The condition of this estate does not indicate the possibility of any residuum after paying the legacies to which the plaintiff is entitled

under the will. The most that is or can be claimed by the plaintiff under this contract is the power to dispose by will of \$10,000 of the testator's estate. If that is to be secured, possibly the only way would be, as claimed by the plaintiff, to set apart the amount at interest, pay the interest to the residuary legatees, and grant leave to the plaintiff's appointee after her death to apply for the fund. I shall reserve all the questions arising about this contract till the coming in of the master's report, and if it shall then appear that there will be any fund in the hand of the executor this can be determined.

The defendants file a cross-bill, in which they allege that during the late war their father was possessed of some \$20,000 or \$30,000 of gold coin, which he buried for safety near the residence of the plaintiff's mother, in an adjoining county to Fayette county, where their father and these defendants lived, but in the state of Mississippi; that this money has been fraudulently appropriated by the plaintiff; and that she should be held to account for it to them in this suit.

If we admit as competent all the proof offered on this subject, it falls far short of even tending to show that the plaintiff possessed herself of any of her husband's buried treasure, if such he had at his death. It is plain that much of the proof, if not all of it, by which it is sought to charge her with this gold, is wholly inadmissible. It consists entirely of declarations of her husband that he had gold buried of which she knew, most of them made when she was not present; and if she were present and heard such declarations, she would not be bound by them, and her knowledge of its hiding place would not prove that she appropriated it. It is incredible that twenty-five or thirty thousand dollars of gold should be buried, not far from the residence of these defendants, by their father, and they not make any further effort to recover or trace it than they are shown by this record to have made, if they believed it was there at the time of his death. The proof of any admissions by her of a knowledge of this gold is unsatisfactory, and it is not shown that she ever admitted that she got it. Her husband's statements that he had such gold, and had buried it where his wife and her brother could find it, will neither prove as against her that there was such hidden treasure within her power, nor that, taking advantage of her knowledge, she took it into her possession. 1 Greenl. Ev. § 185, note 2; *Smith v. Scudder*, 11 S. & R. 325; *Birdseye v. Flint*, 3 Barb. 500; 1 Greenl. Ev. §§ 197, 197a, 199, 200. The duress of the relation of husband and wife will often secure acquiescence in the false statements of each other. She accounts for the money shown to

have been lent to Trotter without any necessary imputation that she got it from the alleged hidden resources.

Nor can Joel L. Pulliam be charged with the possession of any of this treasure by the declarations of his father that he had placed some of the paper money injured by its burial in his hands to be redeemed at the treasury. The rights of the parties must depend upon their respective interests in the property shown to have had an existence at the time of the testator's death, and not upon any speculations as to what became of large quantities of gold which he boasted of having buried during the war, and which each of these parties affect to believe the other has obtained and appropriated. The cross-bill will be dismissed when a final decree is entered.

The question of interest is reserved. The master will calculate it as he may think lawful on the facts before him, and report his action and the reasons for it. On the coming in of the report, and its confirmation, the plaintiff will be entitled to a personal decree against the executor for whatever amount may be found in her favor on account of the legacies given her by the will, less so much of said legacies as were necessarily paid in the discharge of lawful debts. This disposes of her equity against the executor. Her equities against the other legatees and devisees are simple. She is entitled to be subrogated to the rights of creditors, so far as her legacies have gone to pay their debts, but no further. It is not her legacy which is charged upon the residuum of the estate, but the debts, and she is entitled to charge the lands or other property only so far as debts have been paid with her money. To that extent (and the master will report how this is) her claim will be a lien on the lands, to be satisfied first out of those devised to the residuary legatees, and last out of the Isbell plantation. I do not see that she has any equity against Joel L. Pulliam's estate for the money paid him, which was wrongfully paid, because barred by the statute of limitations. She must look to the executor for that, and has no claim to recover it back from the creditor. If the debts were fraudulent, as charged in the bill, she would have that right, but they are not. There being no regular master in chancery in this court, J. B. Clough, Esq., one of the commissioners of the court, will be appointed special master to take the account.

PULLIAM v. PULLIAM, Ex'r, and others.

(Circuit Court, W. D. Tennessee. February 12, 1881.)

1. PRACTICE—REHEARING—INTERLOCUTORY DECREE.

A petition for rehearing is not necessary where there has been only an interlocutory decree ordering an account; nor is it irregular to consider at the hearing, on exceptions to the master's report, all questions determined in the former decree.

2. SAME—BILL BY LEGATEE FOR AN ACCOUNTING.

A specific legatee, filing a bill for a general account of the administration, is not confined to the particular errors alleged in the bill, as she might be if she were surcharging and falsifying a stated account.

3. EXECUTOR—LIABLE FOR LOSS BY DEPRECIATION IN PRICE FROM DELAY OF SALE—EXTENT OF LIABILITY.

An executor who delays for 14 and 20 months to sell cotton of the estate, for no other reason than a belief that it will advance in price, will be held for all losses by depreciation in price, although he may have dealt with his own cotton in the same way. He thereby becomes liable absolutely for the value of the cotton at the time he should have sold it, and will not be credited with a loss incurred by the failure of his factor, although the factor at the time was of good credit.

4. SAME—LIABLE FOR INTEREST ON SPECIFIC LEGACIES.

Specific legacies bear interest from the death of the testator. Therefore, where certain notes belonging to a wife before her marriage were bequeathed specifically to her by the husband's will, and certain other property was also given to her specifically, she is entitled to interest although the property was used by the executor for the payment of debts which would have been lawful if there had been a deficiency of other assets.

5. SAME—PRINCIPLES OF EQUITY GOVERNING THE LIABILITY OF EXECUTOR FOR INTEREST.

Upon an examination of the cases, the principles upon which a court of equity will charge an executor with interest on balances found against him are stated to be: (1) Where he keeps in his hands moneys which it is his duty to invest or pay to the persons entitled, he will be chargeable with interest when he makes interest, or is presumed to have done so, because he has used the fund for himself, or mingled it with his own funds, or kept it idle during an unnecessary delay in settling his accounts. (2) He will not be chargeable with interest on the theory of a *quasi* criminal penalty for a breach of trust. (3) The presumption that he has made interest does not arise where no funds, as a fact, come into his hands, or were immediately paid out in good faith for a purpose erroneously supposed to be lawful. (4) What is to be deemed an unnecessary retention of funds is a question of fact, depending upon the circumstances of each case; but the court will not act on mere inferences, and the balances retained must be to a considerable or substantial amount compared with the whole estate. *Held, therefore*, where the executor was charged by the master with losses on sales of cotton incurred by his negligent delay in selling it, and for money paid to a creditor after the claim was barred by the special statute of limitations in favor of decedent's estates, that he was not, on the facts of the case, chargeable with interest on these sums. *Held, also*, that he was not chargeable with interest on a small balance of \$500 used by him in paying his own debts, the estate amounting to as much as \$30,000, and it appearing that

he had waived all compensation. *Held, also*, that interest will not be charged from the filing of the bill, but only from confirmation of master's report, unless the executor was liable for it in the first instance.

6. EXECUTOR DE FACTO—EXTENT OF LIABILITY—AS AGENT AND ATTORNEY.

A person named as executor in the will, who refuses to qualify and renounces the trust, but who becomes the *de facto* executor and assumes the whole management of the estate, will be liable, *as executor*, for assets actually received by him, but not for losses incurred by his negligence for which the lawful executor is liable; and this, although he received the assets as the agent and attorney of the lawful executor in cases where he has not delivered them over to him. He is liable also as *agent and attorney*.

7. SAME—AN EXPRESS TRUSTEE OF AN IMPLIED TRUST—CANNOT HOLD ADVERSELY WITHOUT NOTICE.

The common statute of limitation of six years is not a defence to a bill in equity seeking an account and satisfaction by a legatee against such person. He is, in that case, an express trustee, the trust being implied from the contract of agency, and not against the contract upon the evidence. This distinction explained. Nor can such a trustee denude himself of his trust and hold adversely, without notice to the *cestui que trust*.

8. ESTATES OF DECEASED—APPROPRIATION OF ASSETS—CREDITOR HOLDING DEBT BARRED BY STATUTE, AN EXPRESS TRUSTEE.

A creditor of the testator, holding a debt barred by the special statute of limitations in favor of decedent's estates, cannot receive or appropriate assets to the payment of his debt so barred, without becoming liable to the executor and legatee in equity for the money so wrongfully paid to himself, and he must refund it, with interest; nor is he protected by the common statute of limitations from the time of the appropriation, being an express trustee, under the circumstances above stated, until the *cestui que trust* has been notified.

9. SAME—A STATE STATUTE LIMITING TIME FOR PRESENTATION OF CLAIMS A RULE OF PROPERTY AS TO TRUSTS, AND IS BINDING ON FEDERAL COURTS SITTING IN EQUITY.

A statute of Tennessee, which provides that unless a creditor shall, within two or three years, as the case may be, present his claim to the executor or bring suit thereon, it shall be forever barred and the executor liable to account for any payment made, is not only a statute of limitations, but a rule of property relating to trusts, which the legislature of the state alone can make, and as such it is binding on the federal courts sitting in equity.

10. WILL—REAL ESTATE—LEGACY CHARGE ON LAND.

If a will exonerates a specific legacy by charging the debts upon all the estate, real and personal, the land is not liable to the specific legatee unless, on a deficiency of personal assets, the specific legacy has gone to pay debts.

11. WILL—HUSBAND AND WIFE—POST-NUPTIAL BOND—SATISFACTION.

A specific legacy, given to a wife by a will, is a satisfaction of a post-nuptial bond for like amount, unless the intention clearly appear to the contrary.

12. BILL FOR ACCOUNT AND SATISFACTION OF LEGACY—FORMAL PARTIES—JURISDICTION.

Where a citizen of another state, being a specific legatee, filed a bill against the executor and residuary legatees for an account and satisfaction of her legacy, *held*, that the court had no jurisdiction to decree an account and relief in favor of residuary legatees, citizens of the same state with the executor, who had filed no cross-bill, and were only defendants for the purpose of ascertaining the rights of the plaintiff.

In Equity.

See the former opinion delivered in this cause, *ante*, 23, for the facts.

Wright, Folkes & Wright, for complainant.

Calvin F. Vance, H. C. Moorman, Harris & Turley, and C. C. Harris, for defendants.

HAMMOND, D. J. This cause comes again before me on exceptions to the report of the special master, John B. Clough, Esq., and on a petition for rehearing as to the question of the money paid to Joel L. Pulliam after the bar of the statute in favor of dead men's estates.

I find it unnecessary to determine whether a petition for rehearing can be heard at this stage of the cause. The former decree was only interlocutory, for an account, and on final hearing all questions are open. *Fourniquet v. Perkins*, 16 How. 82.

LOSSES ON COTTON.

The executor excepts to the master's charge of \$6,730.35, losses on cotton belonging to the estate. I cannot do better than to appropriate, as the opinion of the court, the report of the master on this subject, it is so thorough and to my mind so conclusive an exposition of the facts as shown by the proof and the law as I find it after a careful examination of the authorities.

Nor do I think the fact that there are no specified allegations in the bill in regard to this cotton alters the case. It is not like a bill to surcharge and falsify a stated account, or to reopen a settlement. It is for an account of this administration *de novo*, and the plaintiff is in no sense bound by the settlement in the county court of which she had no notice, either actual or constructive. As a mere question of evidence, the settlement in the county court is *prima facie* taken in favor of the executor, but it is not binding on the plaintiff, as it might have been, perhaps, if she had been present or notified. Besides, the proof shows that this executor himself did not know the facts about this cotton, and how could the plaintiff? They were disclosed only by the searching investigation necessary in taking this account before the master. I am satisfied this is not a case for the application of the rule so much relied on, that we must be confined to the bill and issues made by it in taking the accounts. In *Badger v. Badger*, 2 Cliff. 137, it is distinctly stated that "he had given public notice to all persons interested," and *Lupton v. Janney*, 13 Pet. 381, was placed by the court "wholly upon the ground of lapse of

time," and the meaning of this is apparent when compared with the report in 5 Cranch, 474. The supreme court says, in *Perkins v. Hart*, 11 Wheat. 237, that, even at law, a settled account is only *prima facie* evidence of its correctness, and concludes nothing as to items not stated in it. *Hager v. Thompson*, 1 Black, 80-93; *Piatt v. Vattier*, 9 Pet. 405; *Stevens v. Page*, 7 How. 819; *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Lidderdale v. Robinson*, 2 Brock. 159; *Pratt v. Northam*, 5 Mason, 95.

These cases show that when acquiescence, lapse of time, and the statute of limitations are relied on, and it is shown that a settlement has been made of which the parties had notice, and it is sought to be reopened by bill charging fraud, mistake, or the like, the court requires strict pleading, alleging the fraud and omissions, and explaining why they were not set up at the time of the hearing. But these rules cannot apply to a case like this, where no final settlement has been had, except one that is *ex parte*, the effect of which is prescribed by statute and well understood not to preclude an accounting *de novo* in a court of equity, if any errors have been shown, even in the state courts. It is said that the rule which binds a party to an account to which he does not except, presupposes proper notice. *Carr v. Lowe*, 7 Heisk. 84; *Jameson v. Shelby*, 2 Humph. 198, 200, which was not a bill for a general account, but only to correct one item; *State v. Hyde*, 4 Bax. 464.

The master says, in reference to this cotton:

"After a very careful examination of all the proof, I find and report that John N. Pulliam, in the year 1864, raised a crop of cotton on his home place, in Fayette county, and in the year 1865 he raised a crop of cotton on the Isbell place, in said county. Of this 1864 crop a portion had been hauled to Memphis and disposed of before the death of John N. Pulliam, and the balance was stored in two cabins on the Isbell place. On November 16, 1865, this cotton, amounting to 22 bales, was shipped by the executor at La Grange, Tennessee, by rail to George W. Trotter, a merchant at Memphis, Tennessee, and was received by him on the eighteenth day of the same month, and stored in the cotton-shed of Rambaut & Lamb, where it remained until Trotter's failure, when the executor took charge of it and placed it in the hands of Owen McNutt & Co., on May 7, 1867. Said firm, on June 24, 1867, sold nine bales of this cotton at 24 cents a pound, netting \$906.83; on June 28th following they sold 12 bales at 21 cents a pound, netting \$992.98; and on July 17th following the remaining bale at 17 cents a pound, netting \$67.97—making in all the sum of \$1,967.78, the amount with which the executor charges himself.

"I also find and report that the amount of cotton raised on the Isbell place in 1865, and belonging to the estate, was 38 bales. None of this cotton was ginned or sold at the time of John N. Pulliam's death; but it was all picked,

taken to the home place, some one and three-fourths miles distant, ginned, and hauled back to the Isbell place, and stored before the executor's sale, January 19, 1866, there being no gin on the Isbell place. On March 9, 1867, this cotton was sold by Trotter at 20 cents a pound, netting \$2,573.56, the return of sale being dated May 1, 1867. Said George W. Trotter failed about this time, and these 38 bales of cotton became a total loss to the estate, as reported by the executor, except the first dividend of \$86.04.

"It is claimed by the complainant that the executor should have sold this cotton promptly; that he had no right to hold any of it for a period of from 15 to 18 months on a falling market; and that he is, therefore, answerable for the entire loss. The executor, on the other hand, claims that he acted in good faith, and that, therefore, he is not to be made answerable for these losses.

"I find and report that from the qualification of the executor, December 6, 1865, there was an almost constant decrease in the price of cotton down to the time when this cotton was actually sold. I further find that the executor and his attorney, Joel L. Pulliam, treated their own cotton, some 80 to 90 bales, in the same manner as the executor treated the cotton of the estate, recovering from Trotter their own at the same time that the said 22 bales belonging to the estate were recovered from him. The executor, in his settlement with the county court, claims that the 38 bales of cotton, so sold as above stated by Trotter, were shipped and appropriated by him without instructions, and no proof has been adduced to contradict this.

"The Code of Tennessee, § 2243, provides that the executor shall sell the personalty *at public sale*, pointing out the mode. But in *Johnson v. Kay*, 8 Humph. 142, it was held that he might sell 'at private sale or otherwise, and in doing so, generally speaking, he will incur no liability beyond accounting for their value;' and in *Hunter v. Bryant*, 12 Wheat. 32, the supreme court of the United States decided that an 'executor, who takes charge of the affairs of a man in trade, must necessarily, in the winding up of his affairs, be allowed a reasonable discretion.' *Smith v. Smith*, 4 Johns. Ch. 282; *Bradshaw v. Cruise*, 4 Heisk. 260; *Thompson v. Brown*, 4 Johns. Ch. 619. In his life-time John N. Pulliam sold his cotton through said Trotter, as his cotton merchant, and Memphis was then a market for Fayette county cotton.

"Assuming there was no *mala fides* in the executor holding this cotton, and that it was held in the best of faith for an anticipated rise, just as he held his own, still I do not think he had a right, as executor, to hold it for such a purpose, though the anticipated advance would have been solely for the benefit of the estate. In *King v. Talbot*, 40 N. Y. (Hand.) 76, it is said by the supreme court of New York 'that the just and true rule is that the trustee is bound to employ such diligence and prudence in the care and management as, in general, prudent men of discretion and intelligence *in such matters* employ in their own like affairs.' This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust. *Hemp-hill v. Lewis*, 7 Bush, 214; *Phillips v. Phillips*, 2 Frem. 12; *Taylor v. Tabrum*, 7 Sim. 12; *Braser v. Clark*, 5 Pick. 96; 6 Mod. 181; 1 Bouv. Dict. 'Devastavit,'

4, 5; *Thompson v. Brown*, 4 Johns. Ch. 629-630; 4 Kent, Com. 551, and note *b, et seq.*

"The 22 bales of the 1864 crop of cotton were shipped to Memphis, November 16, 1865, and the crop of 1865, being 38 bales, was ginned and baled ready for market before the sale of the personal property, January 19, 1866, and I think, and so report, that all this cotton should have been sold promptly, at or about that time, under all the circumstances surrounding this case, and that the conduct of the executor in holding it as he did, for so long a time and on a declining market, and with so large an indebtedness against the estate drawing interest, was not such an exercise of diligence and prudence, *in trust matters*, as would excuse him from the loss thereby resulting. From the deposition of Thomas H. Allen I find that the price of such cotton as this, during the months of January and February, 1866, was 38 cents a pound. Had the executor promptly sold the 60 bales of cotton he would have realized for it \$6,730.35 more than he did; his delay causing a loss to the estate of that amount."

I do not find anything in the cases cited by the learned counsel for the defendants to militate against these conclusions of the master. It is, undoubtedly, often said that the measure of prudence for a trustee is that degree used by an ordinarily prudent man in the conduct of his own affairs. But *non constat*, because a trustee, by the same conduct, loses his own property, that it was a prudent exercise of his trust. Hill, one of the defendants in this case, says he sold his cotton in Somerville, near where all these parties lived, and the estate cotton was kept, for 50 cents per pound, and Allen's testimony is conclusive that it was worth all the master has charged the executor. And yet, keeping it for a higher price for so long a time, the executor sold it for 17 and 20 cents a pound. It does not seem to me, under the facts disclosed, a prudent thing for a man to have kept his own cotton for 15 or 20 months on a falling market, upon any theory that ultimately it would advance. The close of the war threw an accumulated quantity upon the market, and opened an opportunity for unobstructed production, and it was mere speculation to suppose that the emancipation of the slaves would so decrease production as to enhance the price. A man may take such risks with his own, but if he embark the property of others in such a doubtful and dangerous sea of speculation, he must answer for the consequences. The proof shows they held their own cotton, but they lost none of it by Trotter's failure, and how this happened is unexplained.

As to the executor, it is plain that he turned the management over to his brother, Joel L. Pulliam, who, while renouncing the trust imposed by the father's will, became *de facto* the executor, thereby

evading responsibility otherwise attaching to him. But the executor is none the less liable for his acts. I cannot resist the impression made by the whole case that this *de facto* executor conducted the affairs with peculiar selfishness, and in utter disregard of the rights of the plaintiff, and that the responsible executor allowed this to be done. Joel L. Pulliam is dead, and many things are unexplained which probably he could explain; but the burden is on the defendants to show that they did all that could have been done to save this estate from loss. The liability of the executor does not grow out of any imprudent selection of Trotter as the factor: on this ground, probably, he would not on the proof be liable; but out of the long delay in selling the cotton, whereby the executor became absolutely liable for its value without reference to his subsequent conduct in its sale.

Under our statutes of administration two years and a half, and at most three years, are allowed an executor or administrator to finally wind up an estate. Of course many contingencies may protract this term, but it indicates that 15 or 20 months cannot be safely allowed to pass without selling a commodity like cotton, so readily commanding the highest cash prices, and at the same time so fluctuating in value that it has become the chief article of speculative gambling in market values. It would subject estates to irretrievable ruin to allow this element of speculation to enter into their management. I do not hold that executors are to be liable for every delay nor every loss by any delay, but only that unreasonable delay, prompted by no other motive than speculation for a higher price, cannot be indulged, and that 15 or 20 months' delay on a constantly-declining market is unreasonable.

The statutes requiring a public sale are only directory, and although in some states it is thought necessary to especially authorize sales of such commodities by factors, I am of impression that without such statutes an executor may sell in that mode without incurring any risk of loss by depreciation, or by failure of the factor or purchaser, if he acts with ordinary circumspection and prudence, and within a reasonable time. Neither is the test of this prudence to be found in any factitious differences of price which might have been obtained by selling in one mode or at one time, rather than in another; for, in all affairs of men, such matters must depend on sound discretion. But there are limits to the conduct of executors and trustees, and within these limits they must be kept, and in this case the defendants acted beyond all reason in holding the cotton.

I shall not undertake to distinguish cases, but only cite those I

have examined, including all cited in argument, and am content to rest my judgment on the principles enunciated in those most favorable to the executor. *Lockhart v. Horn*, 1 Woods, 628; S. C. 17 Wall. 570; *McKenzie v. Anderson*, 2 Woods, 359; *Ex parte Jones*, 4 Cranch, 185; *Green v. Hanberry*, 2 Brock. 403; *Ventress v. Smith*, 10 Pet. 161; *Head v. Starke*, Chase, Dec. 312; *Johnson v. Kay*, 8 Humph. 142; *Bradshaw v. Cruise*, 4 Heisk. 260, 263; *McCaleb v. Perry*, 5 Hayw. 88; *Mickel v. Brown*, 4 Bax. 468; *Rockhold v. Blevins*, 6 Bax. 117; *Deberry v. Ivey*, 2 Jones, Eq. 370; *Tyrrell v. Morris*, 1 Dev. & Bat. Eq. 559; *Wynns v. Alexander*, 2 Dev. & Bat. Eq. 58; *Cannon v. Jenkins*, 1 Dev. Eq. 426; *Williams v. Maitland*, 1 Ired. Eq. 92; *Whitley v. Alexander*, 73 N. C. 444; *Bryan v. Milligan*, 2 Hill, Ch. 361; *Mikell v. Mikell*, 2 Rich. Eq. 220; *Teague v. Deady*, 1 McCord, 456; *Lamb v. Lamb*, Speers, Eq. 289; *Webb v. Bellinger*, 2 Dess. Eq. 482; *Hext v. Porcher*, 1 Strob. Eq. 170; *Boggs v. Adger*, 4 Rich. Eq. 412; *Clary v. Sanders*, 43 Ala. 287; *Harris v. Parker*, 41 Ala. 604; *McRae v. McRae*, 3 Bradf. 200, 206; *Schultz v. Pulver*, 3 Paige, 182; *Re Butler*, 38 N. Y. 397, 400; *Thompson v. Brown*, 4 Johns. Ch. 619; *Pierson v. Thompson*, 1 Edw. Ch. 212; *Litchfield v. White*, 7 N. Y. 438; *Hasbrouck v. Hasbrouck*, 27 N. Y. 182; *Mead v. Byington*, 10 Vt. 116, 121; *Munteith v. Rahn*, 14 Wis. 227; *Neff's Appeal*, 57 Pa. 91; *Sanford v. Thorp*, 45 Conn. 241.

INTEREST ON THE LEGACIES.

Schedule C of the report shows the property specifically bequeathed to the plaintiff, including the notes and interest on them collected of the debtors, to have been \$12,430.32. The interest on this from the death of the testator to the filing of the master's report, at 6 per cent., is \$8,051.06, making the amount due the plaintiff, principal and interest, \$20,481.38. That specific legacies bear interest from the date of testator's death is settled. *Roper*, Legacies, (2d Am. Ed.) 1250; 2 *Williams*, Ex'rs, (4th Am. Ed.) 1221; *Sullivan v. Winthrop*, 1 Sumn. 1; *Darden v. Orgain*, 5 Cold. 211; *German v. German*, 7 Cold. 180; *Mills v. Mills*, 3 Head. 706; *Jones v. Ward*, 10 Yerg. 161; *Harrison v. Henderson*, 7 Heisk. 315, 348.

INTEREST AGAINST THE EXECUTOR.

The master has not in fact in the account charged the executor with interest on any item found against him, but the report and the proof show that, deducting the value of the lands, the executor is

charged with a balance in his hands, or that should have been in his hands on the theory of the report, amounting to \$16,538.45. If interest were charged on this sum from the date of the executor's settlement in the county court to the date of the master's report at 6 per cent., the usual rate in this state, it would be \$7,905.37, making altogether, without the lands, \$24,443.82,—sufficient to pay the plaintiff and leave a surplus for the residuary legatees of \$3,962.44; and if interest were charged only from the filing of the bill to the date of the master's report, it would be \$3,969.23, making altogether, without the lands, \$20,507.68,—sufficient to pay the plaintiff and leave a balance of \$26.30.

Analyzing this principal sum of \$16,538.45 charged against the executor it will be found partly made up of the \$9,246.02 paid to his brother, Joel L. Pulliam, or, as the proof shows, collected on the notes given in the will to the plaintiff by Joel L. Pulliam himself in his capacity of attorney for the executor, and by him retained, with the consent of the executor, and applied to the payment of his claims against the testator before that time barred by the statute of limitations in favor of dead men's estates. It never actually came into the hands of the executor. He was not a trustee for investment; he never used it as his own, or mingled it with his own funds, or made any interest or profit with it in trade or otherwise; neither did he keep it idle, nor refuse to account for it. He carried it into his accounts, and by his vouchers showed what had become of it when he settled with the county court. He paid it on a debt already determined in this case to have been valid, except that it was barred as presented too late under the statute; but he and the creditor had sought to save this bar by pursuing a statutory mode of saving it, which failed because they did not strictly follow the statute. The payment must, therefore, be held to have been made in good faith and under a mistaken view of his liability to make it.

Another part of the principal sum is the \$6,730.35, losses on cotton. It never came into his hands at all, and it is apparent he has never used it or kept it idle or mingled it with his own funds. Briefly, it may be stated that these losses consist of increased value charged against the executor because of delay in selling the cotton, and failure to collect for sales made by Trotter, the commission merchant, who became bankrupt. It cannot be said that there was any concealment about this cotton. The settlement with the county court does not deal with the subject with that fullness and candor that should have been used

on the facts as they are now disclosed, but it does show that the executor claimed that the loss incurred by Trotter's misappropriation should fall on the estate, and not on him. There is enough indicated to give plaintiff, and others interested, notice, so that they could have had that question passed upon by the court, if she had not chosen to resort to some other court for that purpose. The loss by Trotter's misappropriation would probably not have been charged to the executor, as he was a merchant of good standing, if the executor had acted promptly in selling the cotton. The master proceeds upon the theory that there was ample time to have sold and realized before Trotter's failure, and it is because of this delay, and not because of any negligence in selecting Trotter as the factor, that the executor is charged. And it is to this delay that the cause of the loss must be attributed in determining the liability of the executor for interest; for, while on the facts he may be chargeable with the principal sum, it does not follow that he should also be charged with interest.

The balance of said principal sum, amounting to \$562.08, did come into the executor's hands as a matter of fact. He used \$500.69 in settlement of a debt of his own with Trotter, and collected the remainder, \$62.08, in two small dividends from Trotter's bankrupt estate since the settlement in the county court. On these facts is the executor liable for any, and if any, what interest?

The court said in *Granberry v. Granberry*, 1 Wash. 246, 249, that "there is no general rule which obliges an executor to pay interest. We find from the cases upon this subject that it has been determined both ways, and upon principle it will appear that no general rule can be found; each case must depend upon its own particular circumstances. In some cases the executor ought, and in others he ought not, to answer interest." There is the greatest difficulty in extracting any principle from the cases upon which the courts may uniformly act. It seems to be very much a matter of discretion with the court in each case to be governed by the peculiar circumstances of that case. *Litton v. Litton*, 1 P. Wms. 543; *Tew v. Winterton*, 1 Ves. 452; *Morris v. Dillingham*, 2 Ves. Sr. 170; *Jones v. Ward*, 10 Yerg. 161. This is adverted to in almost all the cases, and necessarily so diversifying them that unless there be nearly an identity of facts there can scarcely be said to be a precedent for any case. Much depends upon the temperament of the judge, and his estimate of the merit or demerit of the special circumstances relied on to excuse the executor, and the particular conduct complained of by the parties. It

is useless to undertake to reconcile cases, and the most that can be done is to examine them for some indication of a common element of decision by which this discretion may be regulated.

An unknown but none the less accurate writer in the Solicitor's Journal has recently given the English cases a critical examination in a very useful article on the subject; and, so far as relates to the points involved in this case, upon an independent investigation I am satisfied with the general correctness of his statements. 11 Cent. Law J. 285, 306, 324, 342. He says:

"The principle on which the court proceeds in such cases has been the subject of considerable controversy, although, however, it has long been settled that a trustee or executor who unnecessarily keeps in his hands moneys which it is his duty to invest or pay to the persons entitled, will be charged with interest. *Atty. Gen. v. Alford*, 4 De G., M. & G. 843, 851; *Stacpoole v. Stacpoole*, 4 Dow. H. L. Cas. 209, 224; *Blogg v. Johnson*, L. R. 2 Ch. 225, 228. The idea that was formerly entertained that the court, in the exercise of a quasi criminal jurisdiction, would condemn trustees or executors to pay interest as a penalty for a direct breach of trust, (*Pearse v. Green*, 1 J. & W. 135, 140; *Saltmarsh v. Barrett*, 29 Beav. 474,) has been disavowed, and the result of recent decisions is to leave the practice of charging interest upon the ground that the trustee or executor either has made or must be taken to have made interest by his use of the trust moneys, constituting moneys in his hands, 'had and received to the use' of the *cestui que trust*. *Atty. Gen. v. Alford*, *supra*; *Mayor of Berwick v. Murray*, 7 De G., M. & G. 497, 519; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Vyse v. Foster*, L. R. 8 Ch. 309, 333. The practical effect of the latter view in restricting the liability of the trustee is to charge him with interest or profits only when he might have made them, as is shown in the lastly above-mentioned cases." 11 Cent. Law J. 286.

Again:

"What is to be deemed an unnecessary retention of trust funds, so as to subject a trustee or executor to payment of interest, is a question of fact to be decided on the circumstances of each case."

And he then deduces the rule as to executors, that if, without necessity to meet growing claims against the estate, they keep the money uninvested merely for the purpose of using it, the court will charge them with interest. *Holgate v. Haworth*, 17 Beav. 259, 260; *Forbes v. Ross*, 2 Cox, 115.

Again:

"Interest is only charged on funds which the executor or trustee has actually retained. If he has lost the trust fund through neglect in calling it in, the court will not charge him with interest. *Tebbs v. Carpenter*, 1 Madd. 290; *Lowson v. Copeland*, 2 Bro. C. C. 156."

But see *Re Pilling*, L. R. 8 Ch. 711, where a trustee was charged with loss and interest on wine left with the debtor. And—

“If an executor, acting *bona fide*, pays money to the wrong person by mistake, the court, although requiring him to make it good, will not, it seems, make him restore it with interest. *Saltmarsh v. Barrett*, 29 Beav. 474; *Bruere v. Pemberton*, 12 Ves. 386.” 11 Cent. Law J. 287.

And—

“It requires clear and distinct evidence that there was a balance in their hands before the courts will charge an executor with interest on balances. It will not act upon a mere probability in reference to it. *Davenport v. Stafford*, 14 Beav. 319, 333. Moreover, it appears that, in order to give a claim for interest against executors, there must be a clear case of improper retention of balances to a considerable or substantial amount. *Jones v. Morrall*, 2 Sim. (N. S.) 252; *Davenport v. Stafford*, *supra*; *Longmore v. Broon*, 7 Ves. 124; *Meliand v. Gray*, 2 Coll. 295.” 11 Cent. Law J. 306.

Other authorities support these positions. Ram, Assets, 512, (6 Law Library, 338;) Fonb. Eq. Book, 2, c. 7, § 6, note *p*; 2 Williams, Ex'rs, (4th Am. Ed.) 1567, and notes; Toll. Ex'rs, 480; 2 Daniell, Ch. Pr. (5th Am. Ed.) 1370, and notes; Bisph. Eq. § 142; 2 Lomax, Ex'rs, 556; *Tew v. Winterton*, 1 Ves. 451, Sumner's notes; *Newton v. Bennet*, 1 Bro. C. C. 359, (Perkins' Ed. and notes;) 2 Story, Eq. Pr. § 1277; 1 Perry, Trusts, §§ 468, 472; *Atty. Gen. v. Solly*, 2 Sim. 518, (2 Eng Ch. Rep. Am. Ed. and notes;) and they find abundant support in the general current of American cases cited in *Turney v. Williams*, 7 Yerg. 171, in that case itself, and many others; *Hook v. Payne*, 14 Wall. 252; *Taylor v. Bentram*, 5 How. 233, 275; *Dexter v. Arnold*, 3 Mason, 284, 290; S. C. 5 Mason, 303, 316; *Union Bank v. Smith*, 4 Cranch, 509; *Gratton v. Appleton*, 3 Story, 755; *Norman v. Storer*, 1 Blatchf. 593; *McKenzie v. Anderson*, 2 Woods, 357.

The Tennessee cases show that here, as elsewhere, while the general rule is well understood to be that of the leading case of *Turney v. Williams*, 7 Yerg. 171, where it is said that interest is not charged against executors as a matter of course, but only where they make interest or profits as a fact, or are presumed to have done so,—as where the executor uses the money for himself, or keeps it idle during an unnecessary delay in settling his accounts,—there has not been, by any means, a uniform application of it; and this want of uniformity has so involved the rule that it is quite impossible to reconcile the cases. Perhaps, in the nature of the case, uniformity of application is itself impossible. In that case the executor enjoyed the

money for his own use, and by false accounts having exhibited the estate as insolvent, he was charged with interest. In *Jones v. Ward*, 10 Yerg. 161, the executor paid improvident expenses of the legatee while at college to save him from disgrace, and the court charged him with interest. So in *Torbett v. McReynolds*, 4 Humph. 214, where administrators neglected to sue for a slave, they were charged with its value and interest. In *Jameson v. Shelby*, 2 Humph. 198, the executor, in good faith, converted bank stock, and he was charged with interest on its value. In *Deaderick v. Cantrell*, 10 Yerg. 263, an executor charged with a trust to invest was made to pay simple interest on yearly balances for a breach of that trust. In *Lowy v. McGee*, 3 Head, 269, an executor, also a trustee for investment, having failed to collect a debt and employ it in the most useful manner for the benefit of the *cestui que trust*, was charged with the lost debt and interest from the time of the loss. In the case of *Governor v. McEwen*, 5 Humph. 240, trustees, not executors, were charged with interest because they neglected to invest as required by their trust. But in *Wood v. Cooper*, 2 Heisk. 441, an agent, acting in good faith, was not charged with interest unless he actually received it. In *Laura Jane v. Hagen*, 10 Humph. 331, a testator emancipated a young slave and provided that she should have \$200 a year for her education. Her mother removed her to Ohio, and, her freedom being denied, the money was never paid. The court allowed her the principal sum, but as "interest in such a case is not a matter of positive law, and whether it shall be allowed or recovered must depend on the circumstances of each case," it was refused, because for several years her residence was unknown to the administrator, and no proper application had been made until the bill was filed; it was allowed, however, from the filing of the bill. In *Fulton v. Davidson*, 3 Heisk. 614, 637, the will appointed executors, but required no duty except that they should pay debts, or at least they were not trustees for investment. Fulton, one of the executors, received all the money, (and it was a wealthy estate,) and at the time he was killed in the confederate army the balance on hand was unpaid and unaccounted for, and he was held responsible for so much as had not been applied to the payment of debts. It does not appear what he did with the funds, but as the controversy was largely made to hold a solvent joint executor liable, it is inferred that the funds were at least endangered by his inability to pay them promptly after the war through his representatives, although the circumstances satisfied the court that he acted with

fidelity and integrity. The court states the rule as to interest to be that "he has the right to continue to hold the residue of the funds for the purpose of paying other debts, and that he could not be chargeable with interest unless it should be shown affirmatively that he converted it to his own use, or that he made interest upon it, or that he failed through negligence to apply it in payment of debts." He was not charged with interest. In *Harrison v. Henderson*, 7 Heisk. 315, the question of interest was not discussed, but the executors, under circumstances showing fraud upon the legatees in the collusive sale of a tract of land for less than its value, which one of them who had resigned bought, and immediately resold for \$1,000 profit, were charged with the price of the land, with interest, and the \$1,000 profit, I infer, without interest; they were also charged with "all the assets received or that might have been received with proper diligence," but, I infer, without interest, except as to the land above mentioned. In *Morris v. Morris*, 9 Heisk. 815, the war prevented the administrator from collecting the assets, but he was charged after the close of the war with all debts lost to the estate through the fault of the administrator in not exercising a reasonable diligence in their collection, but interest was refused. In *German v. German*, 7 Cold. 180, the executor had a balance of \$353.80, out of a fund disbursed amounting to over \$3,000, and the court reversed the chancellor, who charged him with interest, on the ground that he might retain it to pay reasonable expenses of administration. In *Williford v. Watson*, 14 Heisk. 476, no question of interest arose, but the court refused to charge the loss of the fund, by the breaking of a bank, on the administrator, although he retained it after the time for distribution arrived, because the distributees had not tendered refunding bonds under the Code.

Of these cases *Jones v. Ward* and *Torbett v. McReynolds*, and perhaps others, are very strongly against the executor in this case, and would probably justify us in charging him with interest on this whole sum. But I think they are exceptional cases, outside the current of authority in Tennessee and elsewhere, and they have not been, so far as I can find, followed in their harsh application of the rule of interest against executors. They are neither of them, strictly speaking, precedents for this case; and, acting on the conceded principle that each case is governed by its own circumstances, there are such essential differences of fact that I am of opinion that even a court, authoritatively bound by them, would not apply them to a case like this. There is one consideration of this subject which seems to me

controlling in all cases. While the court should sedulously guard the beneficiaries against all wrongful conduct of the executor, and not allow him to take any benefit beyond a reasonable compensation fixed by the court, either directly or indirectly, he should not be so harshly dealt with by imposing penalties of interest where none is made, or could by any possible assumption of facts be presumed to have been made, as to deter prudent and responsible men from taking these trusts.

All men are sometimes more or less negligent in their own as well as other people's affairs, and to visit these penalties upon them is calculated to drive the administration of estates into the hands of irresponsible men. I find this principle running through the cases, and it does seem to me enough to hold this executor liable for the principal sum lost by his negligence, without charging him with interest which it is obvious he has not made, as a fact, nor could have made under the circumstances.

On the small balance used in the payment of his debt to Trotter, and that collected since his settlement, he might be charged with interest; but it is inconsiderable in amount, and as he has asked for no compensation, and will receive none, I shall treat those sums as too small to notice in a case of this magnitude.

Whether he should be charged with interest since the filing of the bill is another question, and I find it as perplexing as the one just considered. Generally, I do not find that the cases make any distinction between a liability for interest before and after bill filed. Indeed, it is said to be a general rule that where an executor is not chargeable with interest he will not be chargeable even with costs, on the theory that the suit is necessary to liquidate his accounts and ascertain his liability. *Newton v. Bennett*, 1 Bro. C. C. 359, (Perkins' Ed. and notes;) 2 Williams, Ex'rs, (4th Am. Ed.) 1752; *Seers v. Hind*, 1 Ves. 294. Interest, except by contract, is almost purely statutory, and even at law is not allowed except as a measure of damages discretionary with the jury. As a general rule, a court of equity does not allow interest on unliquidated demands; but when the demand has been liquidated by the report of a master, or by a decree, it is usual to allow it from that time. *Ryckman v. Parkins*, 5 Paige, 543. In *Mowry v. Whitney*, 14 Wall. 620, 653, this principle is applied in a patent case and interest allowed, not from the filing of the bill, but from the final decree, because the profits sued for were really only damages for infringement of plaintiff's rights, and were unliquidated. The court, however, carefully reserves the right

of a court of equity to allow interest in a proper case. In *Hunn v. Norton*, 1 Hopk. Ch. 392, it was ruled that interest should be allowed from the date of the report. In *Turner v. Burkinshaw*, L. R. 2 Ch. 488, it was allowed from the date of the report, and the principles are stated which change the rule in cases of fraud and concealment, as in *Hardwicke v. Vernon*, 14 Ves. 504. In *Blogg v. Johnson*, L. R. 2 Ch. 225, it is said a mere omission to account does not invoke this rule, and interest was charged only from the date of the report. In *Gallivan v. Evans*, 1 Ball. & B. 191, an administrator *pendente lite* was not charged with interest pending the suit, although he had the fund in hand. In *Dawson v. Massy*, Id. 230, it was laid down as the rule, in cases where he was chargeable with interest, that it should commence from the time when the executor could show no cause for retaining a balance in his hands. In *People v. New York, etc.*, 5 Cow. 331, and *Sivett v. Hooper*, 62 Me. 54, it is said that wherever a debtor knows what he is to pay, and when he is to pay it, he shall be charged with interest if he neglects to pay; and no demand is necessary. And in *Pope v. Barrett*, 1 Mason, 117, the rule is stated that interest is generally due from suits brought in cases where it is necessary to make demand before putting the party in default for non-payment. *Williams v. Baxter*, 3 McL. 471; *Hunt v. Nevers*, 15 Pick. 500; *Rishton v. Grissell*, L. R. 10 Eq. 393. In *Gratton v. Appleton*, 3 Story, 755, an agent was not charged with interest pending the suit where he made none, and was entitled to the judgment of the court whether he should pay. And so it was in *Wade v. Wade's Adm'r*, 1 Wash. 475, where interest was waived on that account; and in *Norman v. Storer*, 1 Blatchf. 593, the executor was charged only from the date of the deposit. *Stearns v. Brown*, 1 Pick. 530, seems to hold that an executor is liable for interest after proceedings commenced only when he makes it. But in *Flintham's Appeal*, 11 S. & R. 16, he was charged from the time of filing his reports in the court below, where he admitted a balance; while in *Hoopes v. Brinton*, 8 Watts, 73, it was held he was liable only from date of confirmation, and should not be chargeable pending exceptions to the report. In *Laura Jane v. Hagan*, 10 Humph. 331; *Sparhawk v. Buell*, 9 Vt. 41, 81; *Brinkley v. Willis*, 22 Ark. 1; *Scrivener v. Scrivener*, 1 H. & J. (Md.) 743, (which I have not seen,) interest was allowed from the filing of the bill. *Pickering v. Stamford*, 4 Bro. C. C. 160, note *e*; S. C. 2 Ves., 581, 586.

The rule to be gathered from the cases, I think, is this: Where an executor is, upon principle, liable for interest, he will be charged

from the time he should have paid the money, from its receipt, or from the date of conversion, according to circumstances; but will sometimes be excused, where the other side is in fault, until demand made or bill filed. If, however, he is, on principle, not chargeable with interest, it will not be reckoned against him until, by a decree confirming the report, his accounts have been settled and the amount he is to pay ascertained.

I feel constrained, therefore, to hold, that, notwithstanding I believe from the facts of this case the executor here has deserted his trust by turning it over to his brother, in whose sole interest he seems to be acting even now by taking his part in this litigation, and that they both have persistently determined to so conduct this administration that the plaintiff should be defeated of her legacy, actuated, no doubt, by a belief that she got more of their father's money than she should have had, he is not, in strict law, liable to pay interest, for the reason that he has made no profit, and has funds to pay her now only because he is to be charged with money saved by the statute of limitations on the one hand and an increase over actual results on the other. To charge him with more than the principal sum would be inflicting a penalty rather on sentimental grounds, than giving compensation for injury actually received. The principal sum, for which the executor is liable, is \$16,538.45, and for this the plaintiff is clearly entitled to a personal decree against him.

LIABILITY OF JOEL L. PULLIAM.

In the opinion given at the hearing I indicated that Joel L. Pulliam was not liable to the plaintiff for the \$9,246.02 paid to him by the executor after the bar of the statute of limitations in favor of dead men's estates. The executor was not then, nor is he now, seeking any recovery of this sum, and I do not consider whether he could recover it. And this is one of the strongest features of this case, and shows how entirely this executor has submitted himself to the domination of his brother's interest as against his own. Ordinarily, as soon as it appeared that an executor was sought to be charged with a wrongful payment to a supposed creditor, he would take steps to recover the money back for the benefit of those to whom it belonged; but, so far as it appears here, this executor has not done this, certainly neither by cross-bill nor otherwise in this case, but on the contrary stands jointly with his brother, and, by the same counsel, insists that he is not liable for it, at least not to the plaintiff. Perhaps this may be

explained by the suggestion made in the record that he is protected by refunding bonds, or by stipulation or agreement to hold him harmless; but, if this be so, it only shows how willing he is to manage his trust in the interest of his brother and against this plaintiff. It is the exhibition of a partiality foreign to the duty of any trustee, no matter how he may feel justified in it.

I have come to the conclusion that whether the executor chooses to act or not, whether he is content to admit the non-liability of his brother's estate or not, the plaintiff can enforce whatever rights the executor has against his brother, and be substituted to them. This question, therefore, is to be considered not only with reference to the rights of the plaintiff as against Joel L. Pulliam's executors, but also to those of the executor of J. N. Pulliam against them. "It is undoubtedly," says Chief Justice Marshall, "the course of the court to decree in the first instance against the party who is ultimately responsible; but this is only done where the parties are before the court at the time of the decree, and their several liabilities are clearly ascertained." *Garnet v. Macon*, 2 Brook. 185, 225. This money paid to the brother was in every sense the plaintiff's money. The notes on which it was collected were hers before her marriage with the testator; the will gave them to her specifically; and in order that her ownership and enjoyment of the legacy should be complete, the will of the testator charged the debts on all the other property, real and personal, in exoneration of that legacy.

Joel L. Pulliam, while renouncing the appointment, became, in fact, the real executor, and managed the whole business to that extent, as shown by the proof, that J. J. Pulliam was only nominally the representative of the estate, and, the former being an experienced and able lawyer, the nominal executor the more readily trusted everything to him. These notes so specifically given to the plaintiff were placed in his hands or came into his hands by reason of this relation, and in his capacity as attorney he sued for and collected them. Being a creditor of his father's estate, he applied the money to the payment of his debt after the statutes which protect dead men's estates had operated to forbid the payment. It seemed to me at the hearing that the plaintiff's only remedy was against the executor; that there was no privity between her and Joel L. Pulliam; and that in analogy to the ordinary statute of limitations money paid on a barred debt could not be recovered. But here the creditor was not simply a creditor receiving payment of his debt; he was more than this. He had been named in the will as executor, and, while not such

in name, he was such *de facto*; he was an attorney, an agent; he was a residuary legatee; he was a son, brother, and step-son; and the facts in this case show that his was the executive mind and he the controlling force in the management of this estate. Now, I do not think he can divest himself of all these relations to the parties and stand in the shoes of a mere creditor. His rights are the same, undoubtedly; but the money was in his hands, not as a creditor, but as agent and attorney, and he cannot, without being a creditor in fact, retain it. He must be held to account as agent and trustee, unless he has shown that his appropriation of the money was rightful and lawful. His claim being barred, he could not excuse his liability to account to this executor, or to the plaintiff whose money he had in his hands as agent and attorney, by showing that he had applied it to the payment of a barred debt. And in this view the defence set up for him, of the statute of limitations, cannot avail him. He was, prior to the settlement, holding the money in his capacity of agent and attorney, in subordination to the rights of all the parties, and not until the settlement did that relation change so that his possession became adverse either to the executor or this plaintiff. The bill was, therefore, filed in time to save any bar. Nor is this trustee character in any sense implied, so that it would be brought under the operation of the statute. He was the agent and attorney by contract, and the fact that he was also a creditor made him none the less so.

Indeed, on the facts of this case, he might, I think, be held as principal executor. A person named as executor, who renounces, will be liable, nevertheless, in equity as executor for such assets as he actually receives. 2 Williams, Ex'rs, (4th Am. Ed.) 1555, 1556; *Lowry v. Fulton*, 9 Sim. 116; S. C. 16 Eng. Ch. 116.

There are some qualifications to this rule, but on examination they will be found to be isolated transactions, or those where the renouncing executor, having complied with his agency for the executor, is pursued for the latter's default, and not cases like this, where he has appropriated the assets. *Dove v. Everard*, 1 Russ. & Mylne, 231. And it was decided by the supreme court of the United States that one dealing with an executor, knowing the facts, who possesses himself of the assets, can be made to refund them in a court of equity, and the assets may be followed for that purpose. *Smith v. Ayer*, 101 U. S. 320; 2 Williams, Ex'rs, (4th Am. Ed.) 800, 801; *Tyrrell v. Morris*, 1 Dev. & Bat. Eq. 559, and note to 2d Ed. by Battle.

Now, whether one charged as executor, notwithstanding his renunciation, is an express or implied trustee, in view of the statute of lim-

itations, I think would depend on the circumstances of the case; and, aside from the fact that he is named executor in the will, the circumstances might still charge him as the one or the other. The supreme court of the state in *Haynie v. Hall*, 5 Humph. 289, says the statute applies in all that class of trusts that become such by matter of evidence as where a party takes possession in his own right, and is turned into a trustee by implication of law; or, as the case of *Wheeler v. Piper*, 3 Jones, Eq. 249, expresses it, where he is trustee "against the agreement" of the parties. But in express or direct trusts created by contract of the parties the statute of limitations does not operate. In such cases the trustee takes possession and holds for another. His possession is the possession of that other, and there can be no adverse holding until the trustee denudes himself of his trust by assuming to hold for himself and notifies the *cestui que trust* of his treachery. But, says the same learned court in *Marr v. Chester*, 1 Swan, 416, 418, "when a trust is implied from the contract of the parties, the *cestui que trust* is as much protected from the operation of the statute of limitations as if the trust had been declared by an express undertaking;" and this furnishes a criterion by which nearly all the cases can be reconciled. *Graham v. Nelson*, 5 Humph. 604; *Guthrie v. Owen*, 10 Yerg. 339; *Smart v. Waterhouse*, Id. 93; *McDonald v. McDonald*, 8 Yerg. 145; *Lafferty v. Turley*, 3 Sneed, 157; *Moffatt v. Buchanan*, 11 Humph. 369; *Carr v. Lowe*, 7 Heisk. 84, 98; *Loyd v. Currin*, 3 Humph. 462; *Harris v. Carney*, 10 Humph. 349; *Robertson v. Auld*, 6 Yerg. 406; *Chaney v. Moore*, 1 Cold. 48; Ang. Lim. §§ 166, 168, 468. If there were nothing in this case except a creditor receiving of the executor payment of his debt after the bar had attached, I should unhesitatingly hold that the creditor would be protected by the statute, because he would be turned into a trustee by implication upon evidence against the agreement of the parties.

But where he is named as executor in the will, and, although renouncing, takes upon himself the administration, so that as to assets actually received he is liable under the doctrine already mentioned, he becomes, in my judgment, as much an express trustee as if he had duly qualified. But he was by contract the agent and attorney of the executor, and, knowing all the facts and the plaintiff's rights in the premises, he received her notes in that capacity, collected her money in that capacity, and became, by necessary implication upon that contract, her trustee and the trustee of the executor, and the case falls directly within the principle so positively stated and so well illustrated in *Marr v. Chester*, *supra*. The fact that there

were other trusts attaching to the fund, such as the trust for the benefit of creditors, to which it may be the trust in her favor was subordinate, does not change this result; nor does the fact that he claimed to be himself a creditor, whether upon a debt already barred or not, alter the case. "A trustee, having possession of the trust estate for his *cestui que trust*, cannot, by any act of his own, without communicating with the *cestui que trust*, so change the character of his possession as to make it adverse." *Armstrong v. Campbell*, 3 Yerg. 200, 236, (Cooper's Ed.) And, in the language of *Taylor v. Walker*, 7 Heisk. 734, 740, "it is not shown in the proof that he disrobed himself of the character of trustee by giving complainants notice of his adverse holding;" at least, not till the settlement with the county court, and from that time the statute does not apply. See table of dates attached to the master's report, where it appears that while more than six years had elapsed from the appropriation of the money by the agent and attorney, to the filing of the bill, it was less than that time from the date of the settlement in the county court, which was made by him, and was the first intimation plaintiff had that he claimed it as his own.

The statute of limitations out of the way, Joel L. Pulliam would, therefore, be liable for the money to either the plaintiff or the executor on either of the grounds above mentioned; and on the first possibly he would be liable even for the losses on the cotton, incurred, as the proof shows, by his mismanagement. But I do not find the cases carrying the doctrine further than to charge a renouncing executor for assets actually received by him. I do not rest my judgment wholly on this ground, conclusive as it is to my mind, and am prepared to hold, (although no case has been cited in argument, and I have found none,) upon principle, that an executor or administrator may recover back from a pretended creditor any money paid to him, and that a creditor with a valid claim, which has been allowed to lapse by failure to present it or sue upon it, as required by the above-quoted sections of the Code, must pay back any money he receives upon it. He will be held to be a trustee, in a court of equity, upon principles already enunciated, and that because his debt no longer exists any more than if he had never had any claim at all.

Ordinarily, money paid under a mistake of law cannot be recovered back, while if paid under a mistake of fact, without negligence, it may. *Bisph. Eq.* §§ 184, 195; *Elliot v. Swartwout*, 10 Pet. 137; *Hunt v. Rousmanier*, 8 Wheat. 174; *Bank of U. S. v. Daniel*, 12 Pet. 32; *Railroad v. Soutter*, 13 Wall. 517. But courts of equity afford

relief where additional circumstances constitute sufficient grounds for interposition, and always where there is encouragement, misrepresentation, or ignorance taken advantage of by the party receiving the payment. Bisph. Eq. § 188. Whether the facts here would be held to show a mistake of law as to the legal effect of the supposed request for delay, or of facts as to the existence of a valid request, would be a nice question if it were necessary to decide it. But, on all the above authorities, an agent or attorney employed to manage his client's affairs, who, whether by ignorance or design, leads that client to suppose that, as a matter of law, he can safely make a payment to himself, cannot relieve himself from liability to refund on the ground that there has been a voluntary payment made under a mutual mistake of law.

The executor here had a right to a correct judgment from Joel L. Pulliam on that question, and he cannot protect himself against an erroneous judgment on such a ground. In *Lupton v. Lupton*, 2 Johns. Ch. 626, it was ruled that a legatee receiving more than his share must refund in favor of others. *David v. Frowd*, 1 Myl. & K. 200; *Williams v. Gibbes*, 17 How. 239, 255; 2 *Williams, Ex'rs*, 1244; *Orr v. Kaines*, 2 Ves. Sr. 194. It was ruled in *Johnson v. Moseby*, (MSS. opinion, Knoxville, Sept. 1880,) 1 South. Law J. (N. S.) 802, that a creditor who, without an indemnity bond, received more than his share, could not upon subsequent insolvency, at the instance of other creditors, be compelled to refund the excess over his *pro rata*; while in *Ewing v. Morey*, 3 Lea. 381, where, in insolvency proceedings, a creditor received more than his share, he was held to be a trustee as to the excess for the others. But in these cases there was a valid and subsisting claim; here there was no valid claim, but, on the contrary, one that was extinguished. The distinction is obvious. Nor need I consider the question whether the debt was really extinguished or remained so far obligatory that it would support a payment. There is undoubtedly a principle (and it was that misled me at the former hearing) that a debt barred by the statute of limitations or discharged in bankruptcy, will, nevertheless, support a payment, or a new promise to pay, after the bar has attached or the discharge has taken effect. But this must be confined to the ordinary statute of limitations, and cannot be said of the statutes in favor of dead men's estates. As to a new promise to pay, the executor or administrator cannot make a valid one after the bar of these statutes has attached, and it is settled that he cannot waive this statute, while he may the ordinary statute of limitations. *Batson v.*

Murrell, 10 Humph. 301; *Brown v. Porter*, 7 Humph. 373; *Byrn v. Fleming*, 3 Head, 658; *Wharton v. Marberry*, 3 Sneed, 603; *Woolbridge v. Page*, 9 Bax. 325; *Woodfin v. Anderson*, 2 Tenn. Ch. 331.

Now, if the executor cannot waive this statute, or make a new promise, how can it be said that an actual payment may be made. Or, rather, if the creditor could not sue upon and maintain a new promise to pay, how can he support an actual payment? It is conceded the executor is liable, because there is no obligation on him to pay, and he cannot do it without a breach of trust. No more can the creditor legally receive it. In the case of the ordinary statute the debtor may pay, or promise to pay, and even an executor may do it and the law protect both. But if the doctrine contended for by the defendants is sound in this case, the man who pays must lose, while he who receives may gain by retaining that which belongs to another; if it is wrong to pay, it is wrong to receive. Nor do I think it depends, even in the case of the ordinary statute of limitations, upon any distinction as to whether the effect of the statute is to extinguish the debt or only bar the remedy. Whether the particular statute does one or the other is a question of construction; whether the Tennessee statute does the one or the other need not be determined here. A discharge in bankruptcy effectually extinguishes a debt, and yet it will support a new promise, or an actual payment; because while a man lives there is a moral obligation on him to pay his debts, whether the legal obligation be extinguished or only barred, and in that sense the debt is never extinguished. But *non constat* that this is so when a man is dead; that moral obligation perishes with him, and survives neither to his executor nor his heir as a matter of law, though he may, by will, confer it on them. Anciently his property went to the first taker, or was absorbed by the church for pious uses; but the law-making power interfered, and by statute imposed on his property a trust for the benefit of his creditors. In this view the proceedings to recover the debt are, in a large sense, proceedings *in rem* against the property. It has never been denied that the legislature may attach such conditions as it chooses to this trust.

These statutes attach a condition precedent that the creditor must proceed within two or three years, as the case may be, to enforce his claim. If he does not, the heir or legatee takes the property absolutely discharged of all further trust for the benefit of the creditors, and may follow it into whosoever hands it goes. It does not matter that the person in possession once had a trust upon it; if that trust no longer exists he cannot keep it.

These statutes, for the protection of dead men's estates, may fall under the generic term of statutes of limitation, but they are also something more as rules of property, and their effect is not necessarily the same as the ordinary statute of that name.

I have already pointed out some distinctions. There are others. The state is bound by these, but is not by the ordinary statutes of limitation, and for the reason that they are rules of property as well as statutes of limitation. *State v. Crutcher*, 2 Swan, 514; *Chestnutt v. McBride*, 1 Heisk. 389, 394. This is not answered by the suggestion that the creditor may go into another state and collect his debt, which shows it is not extinguished. If the rules of property there be such that his claim is a trust on assets in that state, undoubtedly our laws do not operate to defeat him there, but here they do; and as to assets in Tennessee, he has, when barred, no claim or trust for his debt, and he cannot acquire any by an act of the executor, which is a breach of trust as to those who now solely own the assets, namely: the legatees, and here, the plaintiff, as to this specific legacy. There is nothing in *Puckett v. James*, 2 Humph. 564, to sustain a contrary view. In that case the debt was not barred, and the court says distinctly if it had been the ruling would have been different.

ARE THESE STATUTES BINDING ON THE FEDERAL COURTS?

It has been earnestly argued that these statutes, "being statutes of limitation, are not binding in suits in equity in this court." I do not understand this formula to be anything more than an assertion of the familiar principle that courts of equity are not bound by statutes of limitation as such, and that they proceed, independently of these statutes, upon grounds of their own; sometimes enforcing them as binding because there is a concurrent remedy at law to which they apply, wherefore a court of equity recognizes them; and sometimes using them as analogies in the application of their own rules of decision relating to stale demands and lapse of time. If state statutes have prescribed for their equity courts a different rule of conduct, or state decisions have bound the state equity courts to enforce these statutes (as is sometimes said) as laws binding on courts of equity as well as courts of law, such statutes or decisions are not binding on us here.

To this I readily accede, and, when qualified by the statement that when a federal court of equity does enforce a statute of limitations, either concurrently with a court of law or by analogy, it enforces the

statutes of the state, and not the statutes of England, and draws its analogies from the same, I have no doubt it is a correct statement of the law. But this only refers to these statutes as affecting *remedies*, and not to such as become rules of property. Our Code, § 2763, for example, enacts that seven years' adverse possession vests a good and indefeasible title to land; and such a construction of the common statute as that of *Kegler v. Miles*, M. & Y. 425, makes these statutes, in some cases, *rules of property* as well as statutes of limitation, and as such courts of equity enforce them in all cases, legal and equitable; and, so far as they are rules of property, they are binding on the federal courts of equity, and should be. It would be intolerable if they were not. The result in cases like this, if that were not the rule, would be that one creditor would have a trust on assets for his debt, while another would have none; or the same creditor in one court would have a right to satisfaction out of assets, and in another he would not.

There are, as said in argument, some instances in other departments of the law where similar results grow out of conflict of decision between the state and federal courts; but it is agreed everywhere that such consequences should be avoided, if possible, and I do not care to add the administration of estates to the catalogue of such misfortunes.

The administration of estates belongs peculiarly to ecclesiastical or probate courts; and courts of equity, while assuming jurisdiction to the extent they do, cannot ignore the positive rules of law regulating such administration, and thereby produce confusion on any theory that they act independently. The original statute of limitation did not, in terms, apply to equitable remedies, and for that reason alone it was not binding on courts of equity administering equitable relief. This was not because equity courts were above statutory authority, for when the court found itself for any reason administering incidentally or concurrently *legal* remedies, it obeyed the statute, and only in its own exclusive sphere did it ever assume to be exempt from it. These special statutes of limitation perform for other departments of the law and courts therein a higher function than that of merely limiting causes of action as to time. They are not supplementary substitutes for the common statutes of limitation, but positive rules of law, acting in an independent field of jurisprudence for a different object. Therefore, I hold that, whether binding as statutes of limitation or not, as rules of property they should govern us.

Here, by the death of the testator and the operation of law and his will, the money in controversy became the property of the plaintiff, charged, however, with a trust in favor of his creditors; but this trust does not now exist, or, if existing, is terminated by non-compliance with these statutes, and the property becomes hers absolutely.

The legislature of the state of Tennessee has the power to regulate these trusts and prescribe these rules; and congress has, on the other hand, no power to make or alter these, or any others, on the subject. While the federal equity courts administer the principles of equity law uniformly, and under the same rules of practice, in all the states, necessarily, in so far as they deal with the administration of estates, this practice must be subordinate to the right the states have to prescribe such rules as we find in these statutes for the protection of decedent's estates. Otherwise, we are inevitably and forever bound to those which we have derived from England, and her laws operate for all time, without any power anywhere to change them.

I should not consider it necessary to make the suggestion but for the fact that the position, taken now for the first time in this case, is supposed to have become the established doctrine in the federal courts. It is, in my opinion, a misapplication of the requirement of uniform practice and the rules governing us in regard to the ordinary statutes of limitation, and finds no support in the authorities. The cases cited for it are: *Union Bank v. Jolly*, 18 How. 504; *Payne v. Hook*, 7 Wall. 430; *Boyle v. Zacharie*, 6 Pet. 648; *U. S. v. Howland*, 4 Wheat. 108; *Noonan v. Lee*, 2 Black, 500; *Neves v. Scott*, 13 How. 270; *Smith v. Railroad*, 99 U. S. 398; *Railroad v. Whitton*, 13 Wall. 285; *Carter v. Treadwell*, 3 Story, 25, 51; *Meade v. Beale*, Taney, Dec. 361; *Johnson v. Roe*, 10 Cent. Law J. 328; S. C. 1 FED. REP. 692; *Hall v. Russell*, 3 Sawy. 506. These cases, like many others, are only intended to protect the judicial power of the United States from encroachment by preserving to it the remedies and forms of proceeding which are granted with it, and not at all to set it above the legislative control of the states in matters pertaining to their jurisdiction. The cases cited from the supreme court do not, in my judgment, establish or in the least authorize the doctrine that state statutes, prescribing the time within which a creditor of a decedent must present or sue upon his claim in order to entitle him to share in the assets, and having the effect these do, are not binding on this court. If the other cases cited are intended to establish that doctrine I cannot assent to them.

On the whole case I think Joel L. Pulliam's executors are liable to the

plaintiff for the money he received, and interest on it; but she is not entitled to two satisfactions, and whatever she recovers from them must be credited to the extent of the principal sum of \$9,246.02 on her decree against J. J. Pulliam. As to the interest recovered from Joel L. Pulliam, it is interest on her money and belongs to her, and should not go to relieve J. J. Pulliam of any liability to her. Therefore, let the decree provide that out of whatever sums she realizes from Joel L. Pulliam's estate she shall be paid first interest up to the time of settlement with her, any balance to be credited as above directed, so that so much of the principal sum as she recovers of Joel L. Pulliam's estate shall go to exonerate the executor.

LIABILITY OF THE LAND.

When this case was first before me there appeared to be a deficiency of personal assets and a necessary resort to the land to enforce the trusts of the will; but the investigations before the master have developed the fact that there were sufficient personal assets to pay the plaintiff's legacies, and therefore the land is not liable, and never was. The will does not charge the legacies on the land, but exonerates them from the debts by charging the latter upon the land. *Byrd v. Byrd*, 2 Brock. 169; *Garnett v. Macon*, 2 Brock. 185; S. C. 6 Call, (Va.) 308; *Stevens v. Gregg*, 10 Gill. & J. 143; *Lupton v. Lupton*, 2 Johns. Ch. 628; *Perry, Trusts*, §§ 568, 576; 2 Wms. Ex'rs, (4th Am. Ed.) 1245, and notes. That the interest accumulated since the settlement has carried the legacy beyond the personal assets (if no interest be charged against the executor on these balances against him) cannot affect the case. Residuary legatees are not liable to refund unless in case of an original deficiency of assets. *Walcott v. Hall*, 2 Bro. C. C. 305; S. C. 1 P. Wms. 495, note; *Demere v. Scranton*, 8 Ga. 43; 2 Wms. Ex'rs, 1245.

There were assets enough to pay the debts, and therefore the land is not to be charged, because, at last, the plaintiff would not recover her legacy from the land, but only so much of the debts as had been necessarily paid with her legacy on account of deficiency of personal assets.

POST-NUPTIAL BOND.

The plaintiff is not entitled to any relief on account of the post-nuptial bond mentioned in the bill. It was satisfied by the bequests of the will. *Bryant v. Hunter*, 2 Wheat. 32; S. C. 3 Wash. 48.

But it is not a practical question in this case, in any view, for the reason that there can be no surplus to pay it.

RESIDUARY LEGATEES.

The residuary legatees cannot recover anything against the executor in this cause. It is a bill which has no other purpose, and can properly have none other, than to ascertain the amount due the plaintiff and to enforce its payment. *Payne v. Hook*, 7 Wall. 425; *Hook v. Payne*, 14 Wall. 252; *Haines v. Carpenter*, 1 Woods, 262. Whether, under any circumstances, we would have jurisdiction to decree relief to the residuary legatees against the executor, they all being citizens of this state, I need not now inquire. There are no assets for distribution, and they are entitled to no other relief, in my view of the case.

Let the proper decree be drawn, according to the principles laid down in this opinion, in favor of the plaintiff, as prescribed by the eighth equity rule.

NOTE. See *Hall v. Law*, 102 U. S. 461, 466, on statutes of limitation in a court of equity.

WHITE and others v. ARTHUR.*

(Circuit Court, S. D. New York. January 25, 1882.)

1. SUITS AGAINST COLLECTORS TO RECOVER DUTIES — LIABILITY OF GOVERNMENT IN.

A suit against a collector of customs is a private suit, and there is no claim against the government until a certificate of probable cause under section 989, Rev. St., has been obtained from the court; then the government assumes a certain liability.

2. SAME—JUDGMENT IN—LIABILITY FOR INTEREST ON.

Liability of government for interest on a judgment against collector must be created by statute. It cannot be implied.

3. SAME—REFUNDING OF DUTIES—ACTS OF CONGRESS RELATIVE TO.

The various acts of congress relative to refunding of duties illegally exacted, and interest thereon, reviewed and commented on, and the conclusion drawn that the liability assumed by government does not include the payment of interest upon judgments recovered against collectors of customs, and that such interest cannot be collected.

*Reported by S. Nelson White, Esq., of the New York bar.

4. SAME—INTEREST AS DAMAGES ON WRIT OF ERROR.

The allowance of interest as damages on a writ of error, under section 1010, Rev. St., and under rule 23, Sup. Ct., and the form of mandate affirming, *with interest*, a judgment where collector is plaintiff in error, does not affect the question. They belong solely to putting the judgment in shape.

5. SAME—INTEREST ON JUDGMENT IN—LIABILITY OF COLLECTOR.

There is no personal liability on the part of the collector, after the making of a certificate of probable cause, to pay the interest on judgments obtained against him. Under section 989, Rev. St., he is not liable for such interest if the government is not

U. S. v. Sherman, 98 U. S. 565, and *Erskine v. Van Arsdale*, 15 Wall. 75, cited and explained.

Circular of the commissioner of customs of March 16, 1881, upheld.

At Law.

Hartley & Coleman, for plaintiffs.

Stewart L. Woodford, Dist. Atty., for defendant.

BLATCHFORD, C. J. This is a suit against a late collector of the port of New York to recover back money paid to him for custom duties, and by him paid into the treasury in the performance of his official duty. On the first of March, 1881, a judgment in this suit was docketed in this court in favor of the plaintiffs, and against the defendant, for \$2,295.90. Prior to that, and at the trial of the action, this court, under section 989 of the Revised Statutes, made a certificate of probable cause. It is provided as follows by section 989:

"When a recovery is had in any suit or proceeding against a collector or other officer of the revenue, for any act done by him, or for the recovery of any money exacted by or paid to him, and by him paid into the treasury in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the secretary of the treasury or other proper officer of the government, no execution shall issue against such collector or other officer but the amount so received shall upon final judgment be provided for and paid out of the proper appropriation from the treasury."

On the sixteenth of March, 1881, the commissioner of customs addressed a circular to the first auditor of the treasury, stating that in view of the decision of the supreme court in *U. S. v. Sherman*, 98 U. S. 565, and of the decision of the first comptroller of the treasury in *Stephani's Case*, 26 Int. Rev. Rec. 313, nothing would thereafter be allowed or paid by the United States on judgments against customs officers, under section 989, beyond the amount recovered on final judgment, excluding interest on the amount of the judgment. The decision in *U. S. v. Sherman* was made at the October term, 1878, and that in *Stephani's Case* in August, 1880.

Under instructions from the commissioner of customs, dated March 24, 1881, the collector of the port of New York paid to the plaintiffs \$2,295.90, the amount of the judgment, which was paid and received without prejudice to the claims of the plaintiffs for interest on the judgment from March 1, 1881. The plaintiffs have never executed any satisfaction piece of the judgment, because the commissioner of customs directed the collector not to require one, in order to enable the plaintiffs to procure a judicial determination of the legality of the said decision of the commissioner of customs of March 16, 1881.

The plaintiffs have not applied to the supreme court for a *mandamus* to compel the secretary of the treasury or other officer to pay the interest in question, but the United States attorney now applies to this court, on the foregoing facts, to require the plaintiffs to execute and deliver a full and complete satisfaction piece of the judgment, or to make an order that full and complete satisfaction of the judgment be entered on the records of the court.

Although the commissioner of customs directed the collector not to require a satisfaction piece, it must be assumed that the present application is made with the consent of the treasury department, and that although it is in form an application by the defendant, it is also an application by the government for the purpose of obtaining a judicial decision as to the liability of the government to pay the interest. It is so treated by both parties. The United States attorney relies wholly on the views taken in the decision in *Stephani's Case*. If the government is liable for the interest, the plaintiffs ought not to be required to now enter satisfaction. But the further question arises whether the plaintiffs are now bound to enter satisfaction, even though the government may not be liable for the interest.

1. The question of the liability of the government to pay the interest will be first considered. The *Case of Stephani* was a judgment against a collector of internal revenue to recover back taxes illegally exacted. It arose under section 989. There was a certificate of probable cause, and the question was whether interest should be paid from the date of that certificate. In his decision the first comptroller says that the practice theretofore in his office had been "to allow interest on judgments from the date of the certificate of probable cause to the time of filing the judgment in the treasury department for payment." He holds that the expression "the amount so recovered," in section 989, "as applied to the government, includes only the sum of the judgment and costs;" that the government is not liable to pay interest by force of section 966, which provides that

interest shall be allowed on all payments recovered in civil causes in a circuit court, because the government is not named nor intended by clear inference; that the doctrine that interest is an incident of the judgment, and so follows the principal, has no application to judgments against the government, or to judgments which the government has by force of a statute assumed to pay; that it is specially provided in some cases that the government shall pay interest on judgments or on debts as in section 1090, and in the act of March 2, 1875, (18 St. at Large, 481,) such provision being necessary, "because at common law interest would not be paid;" and that under section 3220, authorizing the repayment to internal revenue collectors of moneys recovered against them in a court for taxes collected by them, and of damages and costs recovered against them in suits brought against them by reason of anything done in the due performance of official duty, the practice had been to allow interest on such judgments from the time of rendition until paid, but that could "no longer be permitted."

It is contended for the plaintiffs that the measure of the responsibility of the government is the liability of the defendant. There can be no doubt that the liability of the defendant to the plaintiff under the judgment, under section 966 of the Revised Statutes, is not only for the amount of the judgment, but for interest on it, unless that liability is barred by other statutes. It is provided as follows by section 966:

"Interest shall be allowed in all judgments in civil causes recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such state."

But the question is whether the government has assumed to its full extent, by section 989, the liability of the defendant. It is very clear that it has not, even without reference to section 966, because by section 989 not only is it necessary that there shall have been a recovery against the collector, but there must be a certificate of probable cause before the liability of the government begins. This is what was decided in *U. S. v. Sherman*, a case to which the provisions of section 12 of the act of March 3, 1863, (12 St. at Large, 741,) now section 989 of the Revised Statutes, were applied by section 8 of the act of July 28, 1866, (14 St. at Large, 329.) In that

case there was a judgment in June, 1869, against an agent of the treasury department. There was no certificate of probable cause made till June, 1874, and then it was obtained by the plaintiff in the judgment and not by the defendant. The treasury department then paid to the plaintiff in the judgment the amount of it, with interest from the date of the certificate of probable cause. The plaintiff then applied to the supreme court for a *mandamus* to compel the payment of the interest from the date of the judgment to the date of the certificate. The application was denied. The court held that no claim against the government arose under section 12 of the act of 1863, as applied to that case, until the certificate was made, and that the government was not liable for the interest which accrued on the judgment prior to the making of the certificate.

In the present case the certificate was made before the judgment was entered, but still the question remains whether the government is liable for interest on the judgment from its date if a certificate of probable cause was made prior to or at the time of the date of the judgment. This point was not decided in *U. S. v. Sherman*.

It is well settled that the liability of the government for the interest claimed in this case must be created by some statute. There is no contract by the government or any of its authorized agents to pay interest. There is no judgment against the United States. There is no suit against the United States. There is no liability of the United States till after a recovery against the collector and a certificate of probable cause. So the question arises as to the construction of section 989.

"As a general rule the government does not pay interest. The exceptions to this rule are found only in cases where the demands are made under special contracts or special laws, expressly providing for the payment of interest. An obligation to pay it is not to be implied against the government as it is against a private party from the mere fact that the principal was detained from the creditor after the right to receive it had accrued." 9 Op. of Attys. Gen. 59.

The principle that interest is not recoverable against the government if it unreasonably delays payment of its debts, as it would be against a citizen, and the further principle that interest is not to be allowed on claims presented to the defendants unless it is specially provided for, are recognized by the supreme court in *Tillson v. U. S.* 100 U. S. 43, 47.

The plaintiffs contend, however, that the interest on the judgment in this case is expressly provided for by statute. A review of the

history of legislation and adjudication in respect to suits against collectors to recover back customs duties illegally exacted, will aid in a decision as to the meaning of the present statutory provisions; and legislation in regard to paying interest on other claims, and on judgments for them, may also be referred to.

Prior to the enactment of section 2 of the act of March 3, 1869, (5 St. at Large, 348,) the moneys paid to a collector of customs for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, were retained by the collector. That act required such moneys to be paid into the treasury, and made it the duty of the treasury department to refund overpayments made under protest out of any money in the treasury not otherwise appropriated. In 1845 it was decided by the supreme court in *Cary v. Curtis*, 3 How. 236, that the effect of section 2 of that act was to take away the right to bring an action against the collector for moneys illegally exacted by him as and for duties, and paid to him under protest, where he had paid them into the treasury before suit brought. This decision was followed by the act of February 26, 1845, (5 St. at Large, 727,) which provided that nothing in section 2 of the act of 1839 should be construed to take away the right of any person paying money as and for duties under protest, to a collector, in order to obtain goods imported by him, the duties not being authorized by law, to maintain an action at law against the collector to try the legality and validity of the demand and payment of duties, and to have a trial by jury touching the same, or to authorize the secretary of the treasury to refund any duties paid under protest. This legislation restored the right to sue the collector. Of course a judgment against him could be enforced by execution against him, and under section 8 of the act of August 8, 1842, (5 St. at Large, 518,) now section 966 of the Revised Statutes, interest on such judgment from its date could be collected by execution against him.

On the eighth of August, 1846, an act was passed (9 St. at Large, 84, 675) providing for the payment by the secretary of the treasury to six different parties named of any excess of duties paid by them to the collector of the port of New York upon the importation of certain specified goods beyond what the same were legally chargeable with, and in four of the six cases interest on the excess is specified as to be paid; the direction as to three of the four being that it is to be interest from the time of the payment to the collector. By section 2 of that act the secretary is authorized, out of any money in

the treasury not otherwise appropriated, "to refund to the several persons indebted thereto such sums of money as have been illegally exacted by collectors of customs, under the sanction of the treasury department, for duties on imported merchandise" since March 3, 1833; "provided, that before any such refunding the secretary shall be satisfied, by decisions of the courts of the United States upon the principle involved, that such duties were illegally exacted; and provided, also, that such decisions of the courts shall have been adopted or acquiesced in by the treasury department as its rule of construction."

In this section 2 nothing is said about paying the amounts of judgments or about paying interest on judgments or about paying interest on sums illegally exacted, but it is the sums illegally exacted which are to be refunded, and the refunding is made to depend on the adoption of, or acquiescence in, the decision of the court by the treasury department. There is nothing in this section 2 to indicate that it was limited to cases of duties paid under protest, while under the act of February 26, 1845, suits could be brought against a collector only where duties had been paid under protest. On the tenth of August, 1846, an act was passed (9 St. at Large, 677) directing the refunding to a party named of "the balance remaining unpaid, and interest thereon," of a judgment recovered by him in this court against the collector of this port for the recovery of duties illegally exacted, "a part of which judgment has been heretofore paid." This general and special legislation indicates an intention in congress to specify interest when it is to be paid. Like instances of refunding to parties named duties illegally or erroneously collected on imports, but without mentioning interest, are found in acts passed June 28, 1848, and March 3, 1849, (9 St. at Large, 720, 780.)

The act of March 3, 1857, § 5, (11 St. at Large, 195,) provided for an appeal to the secretary of the treasury, after protest, from the decision of a collector as to the liability of imported goods to or their exemption from duty, and made the decision on such appeal final, unless suit should be brought within 30 days after such decision.

By the act of April 11, 1860, (12 St. at Large, 837,) provision is made for the repayment, with interest at 6 per cent. per annum from the date of exaction, of certain duties illegally exacted as tonnage and light duties; while by the act of March 2, 1861, (Id. 890,) provision is made for the repayment of a certain amount erroneously paid as

duties, nothing being said about interest. Like provisions, with no mention of interest, are made by the acts of May 1, 1862, and February 18, 1863. *Id.* 903, 917.

By the act of March 3, 1863, § 31, (*Id.* 729,) the commissioner of internal revenue, subject to the regulation of the secretary of the treasury, was authorized "to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and all judgments or sums of money received in any court against any collector or deputy collector for any duties or licenses paid under protest." That provision referred solely to internal revenue, and is superseded by later provisions of law.

By section 12 of the act of March 3, 1863, (*Id.* 741,) the provision was enacted which is now found in section 989 of the Revised Statutes, as before quoted. By section 13 of the same act it was made the duty of the district attorney of the district within which any suit should be brought against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him, which should have been paid into the treasury of the United States, to appear on behalf of such officer, unless otherwise instructed by the secretary of the treasury, and to make a report in regard to such suits annually to the solicitor of the treasury; and it was directed that the same should be reported annually to congress, "with a statement of all moneys received by the solicitor and by such district attorney" under the act. Most of these provisions of section 13 are now in sections 771 and 773 of the Revised Statutes. By said section 12 it was also provided that when, in any such suit, any district or other attorney should be directed to appear on behalf of such officer by any proper officer of the government, such attorney should be allowed such compensation for his services therein as should be certified by the court to be reasonable and proper, and approved by the secretary of the treasury. This provision is now in section 827 of the Revised Statutes.

By section 7 of the act of March 3, 1863, (12 St. at Large, 766,) now sections 1089 to 1093 of the Revised Statutes, interest on judgments rendered by the court of claims is not to be paid unless the United States has appealed, and then interest at the rate of 5 per cent. per annum is to be paid from the time a certified copy of the payment is presented to the secretary of the treasury for payment.

By section 14 of the act of June 30, 1864, (13 St. at Large, 215,) an appeal to the secretary of the treasury from the decision of the collector of customs, as to the rate and amount of duties, costs, and

charges on imported goods, was provided for, after protest, with the requirement that a suit to recover back the duties should be brought within 90 days after the decision. This is now section 2931 of the Revised Statutes. By section 16 of the same act it was provided as follows:

"Whenever it shall be shown, to the satisfaction of the secretary of the treasury, that in any case of unascertained duties, or duties or other moneys paid under protest and appeal, as hereinbefore provided, more money has been paid to the collector, or person acting as such, than the law requires should have been paid, it shall be the duty of the secretary of the treasury to draw his warrant upon the treasurer in favor of the person or persons entitled to the overpayment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated."

Nothing was said about interest. This provision is now section 3012½ of the Revised Statutes. A provision in regard to the paying back by the commissioner of internal revenue, on appeal to him, of internal revenue duties erroneously or illegally assessed or collected, was enacted by section 44 of the act of June 30, 1864, (Id. 239,) which provided for repaying "to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them, or any of them, in any court for any internal duties or licenses collected by them, with the costs and expenses of suit, and all damages and costs recovered against assessors, assistant assessors, collectors, deputy collectors, and inspectors, in any suit which shall be brought against them, or any of them, by reason of anything that shall or may be done in the due performance of their official duties." This enactment is now found in section 3220 of the Revised Statutes.

By section 7 of the act of July 28, 1866, (14 St. at Large, 328,) the secretary of the treasury was authorized to refund duties overpaid, although the provisions of said section 14 of the act of June 30, 1864, had not been complied with, on being satisfied that such non-compliance was owing to circumstances beyond the control of the importer.

By section 3689 of the Revised Statutes, passed June 22, 1874, permanent annual appropriations were made, out of any moneys in the treasury not otherwise appropriated, of such sums as might be necessary for refunding duties erroneously or illegally assessed or collected under the internal revenue laws, and the excess of deposits for unascertained customs duties or customs duties paid under protest.

On the third of March, 1875, (18 St. at Large, 469,) an important act was passed. It provided as follows:

"No moneys collected as duties on imports, in accordance with any decision, ruling, or direction previously made or given by the secretary of the treasury, shall, except as hereinafter provided, be refunded or repaid, unless in accordance with the judgment of a circuit or district court of the United States giving construction to the law, and from which the attorney general shall certify that no appeal or writ of error will be taken by the United States, or unless in pursuance of a special appropriation for the particular refund or repayment to be made: provided, that whenever the secretary shall be of opinion that such duties have been assessed and collected under an erroneous view of the facts in the case, he may authorize a re-examination and reliquidation in such case, and make such refund in accordance with existing laws as the facts so ascertained shall, in his opinion, justify; but no such reliquidation shall be allowed unless protest and appeal shall have been made as required by law."

This does not require a judgment in the particular case, but only a judgment construing the law, which might be had in another case. It does not refer to the payment of a judgment, but to the refunding of moneys collected.

By the act of February 15, 1876, (19 St. at Large, 3,) provision was made for the payment under judgments rendered by the court of commissioners of Alabama claims of said judgments, with interest on the principal at 4 *per cent. per annum* from the date of loss until notice should be given for payment.

In section 3 of the appropriation bill, passed June 14, 1878, (20 St. at Large, 128,) is the following provision:

"For repayment to importers the excess of deposits for unascertained duties, or duties or other moneys paid under protest, including interest and costs in judgment cases, \$250,000: provided, that no portion of this appropriation shall be expended for the payment of claims known as the 'charges and commissions cases.'"

In section 1 of the appropriation bill passed March 3, 1879, (Id. 384,) is the following provision: "To enable the secretary of the treasury, in his discretion, to refund excess of duties and to pay costs in suits and proceedings in 'charges and commissions cases,' in which judgments may hereafter be obtained, or which may be compromised by said secretary, \$15,000."

In section 1 of another appropriation bill passed March 3, 1879, (Id. 414,) is this provision:

"The unexpended balance of the appropriation of \$250,000 made by the act of June 14, 1878, for the repayment to importers of the excess of deposits for unascertained duties, or duties or other moneys paid under protest, including interest and costs in judgment cases, is hereby continued and made available for the payment of all claims to which the appropriation is applicable, which

are not payable from the permanent annual appropriation provided for in section 3689 of the Revised Statutes: provided, that the claim known as the 'charges and commissions cases' shall not be paid without further legislation."

The permanent annual appropriation did not include "interest and costs in judgment cases." Hence, probably, the necessity for the special appropriation. The question is, what do the words "interest and costs in judgment cases" mean? Do they include interest after judgment either on the judgment or on the excess of duties? In regard to judgments in "charges and commissions cases," only excess of duties and costs were provided for, nothing being said about interest.

In section 1 of the appropriation bill passed June 16, 1880, (21 St. at Large, 242,) is the following provision :

"For the repayment to importers the excess of deposits for unascertained duties, or duties or other moneys paid under protest, including interest and costs in judgment cases, \$300,000; which sum is hereby made available for the payment of all claims to which the appropriation is applicable which are not payable from the permanent annual appropriation provided for in section 3689, Revised Statutes: provided, that no portion of this appropriation shall be expended for the payment of claims known as 'charges and commissions cases.'"

In the same section is the following:

"To enable the secretary of the treasury in his discretion to pay judgments in 'charges and commissions' cases, obtained since January, 1879, and which may be hereafter obtained, or to settle any of said cases, in his discretion, by compromise, \$75,000, or so much thereof as may be necessary."

Here the provision is to pay judgments, but nothing is said about interest on judgments. In section 1 of the appropriation bill passed March 3, 1881, (Id. 418,) is a provision in the same words as the one first above cited from the act of June 16, 1880.

It may be admitted that such a suit as the present is a private suit until there is a certificate of probable cause. Then the United States comes in and assumes by statute a certain liability. The question is as to what liability. The plaintiffs contend that the United States assumes all the liability which would be that of the defendant if the United States assumed no liability.

The case of *Erskine v. Van Arsdale*, 15 Wall. 75, cited by the plaintiffs, was a suit to recover back an internal revenue tax illegally collected. The court had instructed the jury that they might, in their verdict, add interest to the tax paid. This was held by the supreme court to be correct. The only decision is that interest might be added

from the time of the illegal exaction to the verdict. Nothing is decided as to interest on the judgment, when the government comes to pay it. The interest put into the verdict is put in before there is any certificate of probable cause, and, if there is none, the government assumes no part of the liability of the defendant.

The allowance of interest as damages, on a writ of error under section 1010 of the Revised Statutes, and under rule 23 of the supreme court, and the form of the mandate in affirming with interest a judgment where the collector is the plaintiff in error, cannot affect the question here. These things all of them belong solely to the putting the judgment in shape as one in a private suit. Nor does the language "including interest and costs in judgment cases" mean interest on judgments. It is entirely satisfied by confining it to the interest included in the amount of the judgment and the costs forming part of that amount. The "amount so recovered," referred to in section 989, being more than the amount exacted and paid, because including in addition interest and costs, was probably regarded as needing explanation to make it clear that it was not merely the amount exacted that was to be refunded, but also the interest and costs forming part of the recovery; that is, on the judgment. The mention of "costs" is indicative of the meaning of "interest." There are no costs after judgment; and, as "costs" are costs before judgment, so "interest," in the same connection, is interest before judgment.

The legislation before recited shows that congress has sometimes provided for interest on judgments and sometimes for interest on excessive duties, and has sometimes omitted the mention of interest. The result of this review is that whatever may have been the practice under the permanent appropriation in the Revised Statutes, and under statutes prior to the appropriation bill of 1878, it is clearly expressed in the appropriation bills of 1878, 1879, 1880, and 1881, that where there are judgments against the collectors of customs for duties paid under protest, interest accruing after judgment on the amount of the judgment, or on the duties improperly paid, is not to be paid by the government either from the permanent appropriation or from the special appropriations. Hence, all has been paid by the government in this case which it is obliged to pay.

2. Under section 989, as there has been a certificate of probable cause in this case, there can be no execution against the collector. There cannot be an execution against him for the interest from March 1, 1881, on the view that, under section 966, interest is due on the

judgment as one against the collector personally, and that section 989 only means that there is to be no execution against him for what the government pays. He is required to pay the money into the treasury. He does so. The district attorney is required to defend the suit and is paid by the government for doing so. The suit is one which can be brought only because congress allows it to be brought. Congress could prevent its being brought. It did so by the act of 1839, as was held in *Cary v. Curtis*. Then it restored the right by the act of 1845. But the suit is one only "to try the legality and validity of the demand and payment of duties," as the act of 1845 says, when the collector has paid the money into the treasury, and there is a certificate of probable cause, it is clearly the intention of section 989 that the collector shall not be liable under the judgment for interest on it if the government is not liable under that section for interest on it. The object of the suit and the judgment is solely to put the claim into an adjudicated shape; what is to be paid on it either by the collector or the government is a matter to be determined by congress. It follows that the defendant is not liable to pay the interest in question.

As everything has been paid on the judgment which is legally payable on it under existing laws, the judgment is satisfied, and an order will be entered to that effect, and directing that the clerk enter in the records of the court all proper entries to show that the judgment is satisfied.

BATES v. UNITED STATES.

(*Circuit Court, N. D. Illinois.* December, 1881.)

1. **CRIMINAL PLEADING—NON-MAILABLE MATTER—REV. ST. § 3893.**

It is sufficient, in an indictment under section 3893 of the Revised Statutes, to describe the particular book, paper, pamphlet, etc., so as to identify it, and then allege, in the language of the statute, that it was of the character there described.

2. **NON-MAILABLE MATTER—"DECOY LETTERS"—FICTITIOUS NAME.**

The mailing of non-mailable matter to a person under a fictitious name, who receives it, is an offence against this statute.

3. **SAME—MAILING BY AGENT SUFFICIENT.**

Such non-mailable matter need not have been deposited in the mail by the defendant in person; if he authorized it to be mailed he is guilty of an offence against this statute.

4. SAME—INEFFECTIVENESS OF THE THING SENT, NO DEFENCE.

The fact that what was sent, in answer to a letter asking for something to procure abortion or prevent conception, would not, of itself, have that effect, is no defence to an indictment under this statute.

5. PRACTICE—ERROR TO DISTRICT COURT—AFFIRMANCE OF JUDGMENT—DISCRETION AS TO DEGREE OF PUNISHMENT.

In a criminal case, upon error to the district court the circuit court, though affirming the judgment of the lower court, is not bound to impose the same sentence; it can award execution in conformity with its own opinion, derived from the facts apparent upon the record, as to the degree of punishment which should be imposed.

Error to the District Court.

Osgood & Riggle and Frank Baker, for plaintiff in error.

Joseph B. Leake, Dist. Atty., for the United States.

DRUMMOND, C. J. This was an indictment against the plaintiff in error, charging him with violating different provisions of section 3893 of the Revised Statutes. He was found guilty by the jury and sentenced to fine and imprisonment. A motion in arrest of the sentence on account of the insufficiency of the indictment was made in the district court, and the refusal of the court to grant the motion is one of the principal errors relied on in this court. The section of the statute referred to, as amended by the act of July 12, 1876, declares the following shall be non-mailable matter: Any book, pamphlet, picture, paper, writing, print, or other publication which is obscene, lewd, lascivious, or indecent, or any article or thing designed or intended for the prevention of conception, or procuring abortion, or any article or thing intended or adapted for any indecent or immoral use, or any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly where, or how, or of whom, or by what means any of these matters, articles, or things before mentioned may be obtained or made, or any letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared to be non-mailable matter, is deemed guilty of a misdemeanor, and liable for every offence to a fine or imprisonment at hard labor, or both.

One of the counts of the indictment charges the defendant with sending by mail a book, the title of which is given, and it is alleged that it was of so indecent and obscene a character that it was improper to state its contents. Various other counts of the indictment

allege that a letter addressed to a particular person, naming him, contained indecent matter. Other counts state that circulars were sent by mail from and to a place named and to a particular person, naming him, giving information where the article referred to [to prevent conception] could be obtained. The main ground of objection to the various counts of the indictment is that they do not set forth in language what was contained in the book, in the letters, or in the circulars. It is said that whether a book, or letter, or circular is within the terms of the law is a conclusion, and the court must be permitted to judge by the use of the special language, or if the case be a picture, or representation, or article, by a copy, or description of the same. I think this objection is not well taken. The object of the law is to exclude certain articles from the mail. If a book, pamphlet, picture, representation, or article, it is sufficient as to that to describe it so as to identify it, or by stating to whom it was addressed, and then to allege that it is within the terms of the statute, as that it is an obscene book, pamphlet, paper, print, picture, or otherwise, or an indecent thing. This is a rule which has been established by the supreme court of the United States in relation to offences against the statute which prohibits interference with or the opening of letters entrusted to the mail by persons other than those to whom they are addressed, (*U. S. v. Mills*, 7 Pet. 138;) so that I think it is sufficient, in an indictment under section 3893, to describe the particular book, paper, pamphlet, etc., so as to identify the same, and then allege, in the language of the statute, that it was of the character there described. Consequently, a count which declares that the plaintiff in error caused to be deposited in a post-office of the United States, (naming it,) for mailing and delivery to the address of a certain person, (naming it and him,) an envelope then and there containing a printed advertisement and a written letter, which together were then and there a notice giving information where, how, and of whom might be obtained an article (naming it) designed and intended for the prevention of conception, was sufficient.

An objection was also taken because these various communications were sent through the mail in consequence of what are called "decoy letters," addressed to the plaintiff in error. The fact was that a detective of the post-office department did send letters to the plaintiff in error under fictitious names, but he was requested to send the communications under fictitious names, and they were received by the detective under these various names. It was the case, therefore, where a person used another name to cause a communication to be

sent by the mail to him under that name, and such communications were accordingly so received. They were, therefore, communications sent to a real person under a fictitious name, and of course it was as much an offence against this statute for the plaintiff in error to cause non-mailable matter to be deposited for mailing as though there had been no fiction in the case.

It is also objected that the district court erred in admitting testimony relating to an article transmitted by express. That testimony was admitted on the assumption that it was sent by the plaintiff in error in answer to a letter addressed to him, and simply for the purpose of explaining the facts connected with the offences charged in the indictment, and not constituting an offence in itself, which, of course, it was not, under this statute. This testimony was received, under proper caution to the jury, with a statement explanatory of the reason why and for what it was admitted, and I think could not have prejudiced the jury against the defendant.

It was also objected that the district court refused to allow the defendant to prove that certain pills which were sent by mail would not, of themselves, prevent conception or procure abortion. I think the ruling of the district court was correct upon that point. The language of the statute is not that the article must necessarily procure abortion or prevent conception, but that it is designed or intended to procure the one or to prevent the other; and these pills were sent in answer to a letter asking for something which might have that effect, and they were sent with the statement that they were just what the writer wanted.

It is further objected that the deposit of the book, letters, circulars, etc., in the mail was not done by the plaintiff in error himself, but by another person. The language of the statute shows clearly that it was intended to prevent any one from violating the law by another as well as by himself, and the jury were specially instructed by the district court that they must be satisfied that the act done was authorized by the plaintiff in error; in other words, that he caused it to be done through another.

The district court was requested by the plaintiff in error to give numerous instructions which in terms were refused by the court, but the court instructed the jury generally upon the law of the case, and so far as there was anything material in the instructions asked for in favor of the plaintiff in error which the law justified the court in giving, they were given by the court, and I cannot see that there was any error in this respect. On the whole, I am of opinion that the judgment

of the district court must stand and be affirmed as to the rulings made during the trial.

This being so, it is insisted by the district attorney that this court cannot change in any way the punishment which was imposed upon the plaintiff in error by the district court; but in proceeding to pronounce final sentence and to award execution, this court must follow the precise terms of the conviction in the district court. I am not of that opinion. The language of the third section of the act of March 3, 1879, relating to this subject, is as follows: "And in case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon." If this court must adopt the terms of the conviction of the district court, it is where the judgment of that court is affirmed, not only as to the rulings made during the trial of the cause, but also as to the sentence. The first section of the statute describes the cases in which a writ of error will lie—where the *sentence* is a fine of \$300 or imprisonment. *In such case* the party aggrieved by a decision of the district court may tender his bill of exceptions. I think one object of the statute was to give to the circuit court authority, not only over the rulings of the district court during the trial, but also over the degree of punishment imposed upon the party, if, upon the whole record before the circuit court, it should appear in the judgment of the court that the penalty was not in conformity with law; as where a fine was imposed when the statute authorized imprisonment only, or imprisonment where it authorized a fine only, or otherwise was unlawful, or where it was too lenient or too severe. In all these cases I think the opinion of the district court is subject to review by the circuit court, and may be changed. It is not necessary to decide whether the circuit court might alter the degree of punishment upon facts which might be established in the circuit court, but did not appear in the record. It is sufficient in this case that, upon the facts apparent upon the record as to the degree of punishment imposed, the opinion of this court differs from that of the district court; and this court will proceed, therefore, to pronounce final sentence, and to award execution in conformity with its own opinion as to the degree of punishment which should be imposed upon the party convicted.

NOTE.

Several interesting and important points are made in the foregoing decision. These may be grouped as follows:

1. **DECOY SOLICITATION.** It is held to be no defence to an indictment under the statute for sending an obscene book by mail that the book was mailed actually to a detective who wrote for it soliciting it under a fictitious name, to which name it was addressed. A similar point was decided in the same way by *Benedict, J.*, in *U. S. v. Bott*, 11 Blatchf. 346; that learned judge holding it was no defence to an indictment for sending a powder designed to procure an abortion that the act was elicited by a decoy letter. It is true that we have a ruling from Judge Dillon (*U. S. v. Whittier*, 5 Dill. 35) that a sealed letter addressed to a decoy, and therefore not "giving information" in the sense of the statute, was not within the prohibition of the statute. But even supposing that Judge Dillon was right in this conclusion, (as to which I may be permitted with all respect to that excellent jurist to express my doubts,) the case is distinguishable from that now before us, which is that of sending an obscene book accompanied with drugs. The sending an obscene book, like that of sending a noxious drug, is made indictable by the statute without the qualification that it should give information, which is the condition applied to that section of the act under which the prosecution before Judge Dillon took place. The statute makes it indictable to send by mail any "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character." Now, if the indictment were for the publication of an obscene libel at common law, no one would pretend that it would be a defence that the libel put in evidence on the trial had been sought for the express purpose of being put in evidence. That a sale to a party requesting the sale for this very purpose is an adequate publication has been repeatedly ruled. *Rex v. Burdett*, 4 B. & Al. 95; *Rex v. Wegener*, 2 Stark. N. P. 245; *Brunswick v. Harmer*, 14 Q. B. 185; *Com. v. Blanding*, 3 Pick. 304; *State v. Avery*, 7 Conn. 268; *Hazleton Coal Co. v. Megargel*, 4 Barr, 324; *Swindle v. State*, 2 Yerg. 581. These rulings are in entire accordance with others in reference to other phases of crime. If I suspect, for instance, an employe of stealing money, I may mark money and have it exposed in such a way as to attract his attention; and if he steal it and be subsequently presented for larceny, he cannot defend on the ground that a trap was laid for him. *Reg v. Williams*, 1 C. & K. 195; *Rex v. Hedge*, 2 Leach, 1083; R. & R. 160; *Reg v. Egginton*, 2 B. & P. 509; 2 Leach, 915; *Rex v. Lawrence*, 4 Cox, C. C. 438; *Reg v. Johnson*, C. & M. 218; *Reg v. Bannen*, 1 C. & K. 295; *U. S. v. Foye*, 1 Curt. 364; *Pigg v. State*, 43 Tex. 108. See *Alexander v. State*, 12 Tex. 540.

It is true that if I should put the piece of money in the possession of the defendant as an absolute gift, this would be a defence, for he could scarcely be held to *take* that which is given to him without any qualification; but if I give it to him with a qualification, making him a mere bailee, (as where I give it to him as a messenger,) or if I leave it about my premises so as to

v.10,no.1—7

attract his attention, without surrendering my possession of it, then the "trap" is no defence. The same distinction is applicable to the opening of a door so as to let in a burglar. The burglar, it is true, cannot be charged with "breaking" a door which is opened for him to get in. It is otherwise, however, as to invitations held out as decoys by one of the inmates of the house, or as to masks in the way of apparent defencelessness, or as to the leaving open of outer doors, provided this does not leave the main entrance open. *Rex v. Johnson*, C. & M. 218; *Allen v. State*, 40 Ala. 334. Such, also, is the rule with regard to counterfeit money. A policeman, by pretending to be an accomplice, may obtain access to a chamber where counterfeiting instruments are collected; but this does not prevent a conviction being rendered on his testimony. *Wills*, Circum. Ev. 117, 118. The guilty party may be induced by a trap to offer the counterfeit coin, but this does not make the offering the counterfeit coin any the less indictable. *Rex v. Holden*, R. R. 154; 2 Taunt. 334. Now, does the fact that a detective attends unlawful meetings for the purpose of afterwards disclosing their secrets and becoming a witness against the wrong-doers make him an accomplice. *Rex v. Bernard*, 1 F. & F. 240; *Rex v. Mullins*, 3 Cox, C. C. 526; *Com. v. Downing*, 4 Gray, 29; *Com. v. Wood*, 11 Gray, 86; *Com. v. Cohen*, 127 Mass. 282; *Campbell v. Com.* 84 Pa. St. 187; *State v. McKean*, 36 Iowa, 343; *People v. Farrell*, 30 Cal. 316; *People v. Barric*, 49 Cal. 342; *Williams v. State*, 55 Ga. 391; *Wright v. State*, 7 Tex. Ap. 574.

One of the most nefarious and infamous conspiracies ever known in this country—that of the "Molly Maguires," in 1876, to coerce by assassination the coal proprietors of the Pennsylvania anthracite region—was exploded, and the chief perpetrators brought to justice by the sagacity and courage of a detective who attended the meetings of the conspirators and thus became possessed not only of their plans for the future but of their exploits in the past. The fact is, there is no crime that is not committed under the influences of some sort of decoy; and to acquit in all cases where the offender is incited to the crime by some instigation of this kind would leave few cases in which there could be a conviction. If the decoy is not intentional it may act by the way of negligence; and if an intentional decoy is a ground for defence so should be a negligent decoy. But it is now well settled that contributory negligence, unless breaking the causal relation between the offender and the offence, is no defence. *Rex v. Kew*, 12 Cox, C. C. 355; *Rex v. Forbes*, 7 C. & P. 224; *Reg v. Parish*, 8 C. & P. 94; *Rex v. Beard*, *Id.* 143.

The only exceptions known to the principle before us exist (1) in cases in which to the offence it is essential that it should be "against the will" of the party injured; and (2) in cases in which the offence consists in certain physical conditions which cannot exist if a trap be laid.

(1) When it is a condition to an offence that it should be "against the will" of the party injured, then there must be an acquittal should it appear that such party invited the defendant to the commission of the offence. This is the case with regard to prosecutions for rape: *Reg v. Fletcher*, Bell, 63; 8 Cox, C. C. 131; *Com. v. McDonald*, 110 Mass. 405; *Brown v. People*, 36 Mich. 203; *State v. Burgdor*, 53 Mo. 65; *Walter v. State*, 40 Ala. 325; to prosecutions for highway robbery: *Rex v. McDaniel*, Fost. 121, 128; *Long v. State*, 12 Ga.

293; to prosecutions for assaults, which are not in themselves offences against the public peace: *Rex v. Wollaston*, 12 Cox, C. C. 180.

(2) When there are physical conditions of an offence inconsistent with a trap, so that these conditions cannot exist when there is a trap, then the defendant must be acquitted. The most striking illustration of this exception is to be found in the case of burglary already noticed. There can be no prosecution for burglary in cases where the door of the house was opened by its owner to give the burglar entrance.

Whether, when the offence is the special product of the trap, the defendant can be convicted, depends upon the exclusiveness of the causal relationship between the offence and the trap. When the defendant was the passive tool of the entrapping party then there should be an acquittal. On the other hand, the defendant ought not to escape conviction in any case (with the exceptions above given) in which he knowingly committed the offence. The most frequent cases under this head are prosecutions for illicit sales of liquor. In an English trial in 1881 (*Rex v. Tittley*, see London Law Times, July 30, 1881) a conviction of this class, when the sale was induced by the adroitness of a detective, was sustained, though it became subsequently the subject of much discussion in the house of commons. In Scotland (*Blaikie v. Linton*, 18 Scottish L. R. 583) a similar conviction in 1881 was set aside by the court of justice on the ground that the offence was the product of the solicitation. But this can only hold good in cases in which the offender's action is not imputable to his free agency.

2. INEFFECTIVENESS OF INSTRUMENT. The ruling of Judge Drummond, that the fact that the pills sent "would not of themselves prevent conception" is no defence, is put on the ground that "the language of the statute is not that the article must necessarily procure abortion or prevent conception, but that it is designed or intended to procure the one or prevent the other;" and he adds "that these pills were sent in answer to a letter asking for something that might have that effect, and they were sent with the statement that they were just what the writer wanted." It may, therefore, be well argued in this particular case that the defendant was estopped from maintaining that the pills were innocuous. But aside from the statute, and the peculiar shape the case took in consequence of the assertions of the defendant, there is little doubt that the decision of Judge Drummond may be supported on principle. The question, indeed, is one which will always continue to agitate not only jurists but casuists. An offence is attempted with unsuitable instruments. Is this indictable? In Germany, after a controversy in which the ablest jurists have taken part, and after numerous treatises have been written on both sides, the high court of appeals (Reichsgericht) has decided that an attempt to commit an offence with unsuitable means is indictable notwithstanding such unsuitability; in other words, *alle untaugliche Versuchshandlungen sind strafbar*. Entscheidungen des Reichsgerichts, bd. 1, p. 439. It is true that this has by no means silenced the dispute which has for so long existed on this interesting topic; and in the first number of the *Zeitschrift für die gesammte Strafrechtswissenschaft* (1881) we have an elaborate and powerful article by Dr. Geyer, an eminent writer on criminal law, controverting the decision of the court. But so far as the ruling goes to

the point that unsuitability of means is not by itself a defence to an indictment for an attempt, it is sustained by numerous adjudications of our courts. *Reg v. St. George*, 9 C. & P. 483; *Rex v. Lallement*, 6 Cox, C. C. 204; *Reg v. Cludway*, 1 Den, C. C. 515; 2 C. & K. 907; *Com. v. McDonald*, 5 Cush. 365; *O'Leary v. People*, 4 Parker, C. R. 187; *Slatterly v. People*, 58 N. Y. 354, and other cases cited; Whart. Crim. Law, (8th Ed.) § 182. See, particularly, *Kunkle v. State*, 32 Ind. 220; *Johnson v. State*, 26 Ga. 611; *Mullen v. State*, 45 Ala. 43; *State v. Napper*, 6 Nev. 451; *State v. Utley*, 82 N. C. 556; *State v. Milsaps*, Id. 549. And this is right. If we should hold that there can be no conviction for attempts with unsuitable instruments there could be few convictions for attempts, since there are few attempts of which we could say that the instruments to be used were absolutely suitable. But to this there are two exceptions: (1) Where a statute says that an offence with a particular instrument is to have an especial punishment, then under this statute, to sustain a conviction, it must be shown that the instrument designated was used. (2) The instrument, at common law, must be one apparently calculated to produce the attempted criminal result. If the offender takes aim with a sunflower, or with a violin, he cannot be charged with attempting to shoot with a gun. But if he takes aim with a gun whose powder is wet, while the instrument is as innocuous as would be the sunflower or the violin, he is, nevertheless, chargeable with the attempt to shoot with the gun. See *Blake v. Barnard*, 9 C. & P. 626; *Reg v. James*, 1 C. & K. 530; *Tarver v. State*, 43 Ala. 354; *Robinson v. State*, 32 Tex. 65. It is true that if the party threatened knows that the gun is not loaded, or is loaded in such a way as to be absolutely ineffective, then the offence cannot be considered as an attempt, or as an assault with intent to kill. *Crumbley v. State*, 61 Ga. 582. But if the instrument is apparently calculated to do harm, and is used in such a way as to make it effective if it is what it seems, then, in the anxiety created, and in the provocation to retaliation it involves, the constituents of an indictable offence are made out.

FRANCIS WHARTON.

OLNEY, Receiver, etc., v. TANNER and others.

(District Court, S. D. New York. January 11, 1882.)

1. JURISDICTION OF FEDERAL COURTS OVER BANKRUPT'S PROPERTY FRAUDULENTLY ASSIGNED.

The district and circuit courts have jurisdiction of a plenary suit brought by any person against the assignee in bankruptcy to assert a claim of superior title to property of the bankrupt fraudulently assigned before proceedings in bankruptcy. This jurisdiction is not affected by the fact that other parties than the assignee in bankruptcy are necessary parties to the suit.

2. RECEIVER OF STATE COURT—TITLE TO PROPERTY ASSIGNED BY DEBTOR IN FRAUD OF CREDITORS—EFFECT OF PROCEEDINGS IN BANKRUPTCY.

The receiver of a judgment debtor appointed in supplementary proceedings in the state court, under the New York Code of Procedure, does not acquire *ipso facto*, by virtue of such appointment, a title to property previously assigned by the debtor in fraud of creditors, nor any lien thereon, until suit to set it aside, or other legal proceedings or notice of his claim to treat the assignment as void; and if no such suit or proceedings are brought or taken by such a receiver until after the commencement of proceedings in bankruptcy, the receiver has no title in the property superior to the assignee; nor can he thereafter, under the rule established by the supreme court, (*Glenny v. Langdon*, 98 U. S. 20,) maintain an action to vacate the fraudulent assignment.

3. SAME—HOW VESTED WITH TITLE TO DEBTOR'S PROPERTY.

Such a receiver represents his judgment creditor only, and, like a receiver in a judgment creditor's bill, does not become vested with the title to such property except through an action to which the fraudulent assignee is a party.

4. SAME—RECOGNITION IN FOREIGN OR INDEPENDENT TRIBUNALS BY COMITY ONLY—NOT ENTITLED TO OBTAIN PREFERENCE OVER OTHER CREDITORS.

A receiver, as an officer of the court that appoints him, is recognized in foreign or independent tribunals by comity only. *Semble* that this comity is not to be extended so as to confer preferences in favor of particular creditors to the detriment of the general creditors whose interests foreign or independent tribunals are charged with protecting, and that such a receiver is not entitled to the aid of a federal court, sitting in bankruptcy, in obtaining a preference over other creditors entitled to its protection.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS—PROOF OF FRAUDULENT INTENT REQUISITE TO SET IT ASIDE—NOT INVALIDATED BY DELINQUENCIES OF ASSIGNEE.

An assignment for the equal benefit of all creditors should not be set aside in favor of one creditor as fraudulent except upon clear and convincing proofs of fraudulent intent. If complete and perfect in itself, and not fraudulent in its inception, it is not invalidated by the subsequent remissness or inefficiency or errors of judgment of the assignee.

6. SAME—SUBSEQUENT ACTS OF DEBTOR WHEN NOT EVIDENCE OF FRAUDULENT INTENT.

The subsequent employment of the assignor or the continuance of the business for working up the old stock, or the fulfilment of outstanding contracts, and the purchase of necessary goods therefor, *held*, in this case, not sufficient evidence of an original fraudulent intent.

In Equity.

Norwood & Coggeshall, for complainant.

Charles Jones, for defendants.

BROWN, D. J. This is an action brought to set aside as fraudulent and void a voluntary assignment made by Nicholas Swartwout to the defendant Tanner, on March 28, 1877, in trust for the equal benefit of his creditors.

On March 27th, the day preceding the assignment, Valentine H. Seaman recovered a judgment against Swartwout, in the supreme court of this state, for the sum of \$4,107.84, upon which execution was duly returned unsatisfied. Thereafter, upon proceedings supplementary to execution, in accordance with the state practice, the plaintiff was appointed receiver of the judgment debtor on August 15, 1877, and on August 22d a copy of the order was served, filed, and recorded, as required by the state law, so as to invest the plaintiff with whatever rights legally accrued to him as a receiver of the judgment debtor so appointed. The plaintiff claims that he thereby became vested with the legal title to the property conveyed to Tanner some four months before.

On September 11, 1877, involuntary proceedings in bankruptcy were commenced in this court against Swartwout, upon which he was adjudicated a bankrupt on October 1, 1877. In January, 1878, the defendant Sage was appointed assignee, and an assignment of the bankrupt's property was duly executed to him.

Thereafter on the ninth day of May, 1878, this bill was filed by the receiver, as complainant, against Swartwout, the judgment debtor. Tanner, his voluntary assignee, and Sage, the assignee in bankruptcy. The bill alleges that the assignment was fraudulent and void because made with an actual intent to defraud creditors; and also that the "assignment was absolutely void" under the state law because no schedules of property and debts were filed until July 30, 1877, and not within 30 days after the execution of the assignment as required by the state law; that the plaintiff, by virtue of his appointment as receiver, "became entitled to the possession and collection of all the assigned property;" and on the above grounds the complainant asks that the assignment be declared fraudulent and void as against the plaintiff, and that Swartwout and Tanner be compelled to account to the plaintiff for all the assigned property or its proceeds, and that the plaintiff be appointed receiver in this suit of all the said property, with the usual injunction.

Sage, the assignee in bankruptcy, was served with a subpoena, but

did not appear or answer. The other defendants have answered, denying the jurisdiction of the court, the right of the complainant to institute or to maintain in this court such a suit as this, and also denying the alleged fraudulent intent, or the legal invalidity of the assignment.

The cause is submitted on the pleadings and proofs.

By section 4979 of the Revised Statutes this court has jurisdiction of any action "brought against an assignee in bankruptcy by any person claiming an adverse interest touching any property or rights of the bankrupt transferable to or vested in the assignee."

If the property assigned by Swartwout to Tanner in March, 1877, was conveyed to him in fraud of creditors, as alleged in the bill, then, by the terms of section 5046, such property or its proceeds became "vested in the assignee in bankruptcy" when he was subsequently appointed, unless the appointment of the complainant as receiver of Swartwout in the state court, prior to the commencement of the proceedings in bankruptcy, had already vested the title thereto in the receiver.

The proofs show that all the property, except such as was foreclosed under outstanding mortgages, has been sold by the voluntary assignee, and that less has been realized than the amount of the receiver's judgment. If the plaintiff's claim is sustained, and he is appointed receiver of said property in this suit for the benefit of his judgment creditor, the result will be that the whole property of the bankrupt will be applied upon the judgment of a single creditor, to the exclusion of the assignee in bankruptcy and of all other creditors. In so far, therefore, as the case involves a claim of priority in the application of the assigned property or its proceeds to the judgment of Seaman exclusively, it is the case of a person claiming an interest in the property of the bankrupt adverse to the interests of the assignee in bankruptcy, within section 4979. The assignee in bankruptcy was a necessary party to the suit in order to make a valid sale of the real estate referred to in the bill, as well as to be bound by the distribution of the proceeds; and as the plaintiff's claim of title to the property is adverse to the interests of the assignee, and of all other creditors, the case seems to me to be within the very language of section 4979. That section does not confine jurisdiction to cases in which there is nothing else involved except an "adverse claim;" it embraces "all suits in law or in equity" between the assignee and persons claiming an adverse interest. Questions like those here presented can only be determined by plenary suit, (*Smith v. Mason*, 14 Wall. 419;

In re Kerosene Oil Co. 6 Blatchf. 521;) and if the "suit" involves as an essential part of it the determination of such an adverse claim, then the whole "suit" is properly brought in the district or the circuit court, although other questions be involved, and other parties be necessarily present to be bound by the decree. *Burbank v. Bigelow*, 14 N. B. R. 445, 447; *Lathrop v. Drake*, 13 N. B. R. 472; *In re Casey*, 10 Blatchf. 376, 382; *Marshall v. Knox*, 16 Wall. 551; *Bachman v. Packard*, 7 N. B. R. 353; *Morgan v. Thornhill*, 11 Wall. 65; *In re The Iron Mountain Co.* 9 Blatchf. 320; *Foster v. Ames*, 2 N. B. R. 455; *Markson v. Haney*, 12 N. B. R. 484; *Glenny v. Langdon*, 98 U. S. 24.

2. Upon the authority of the case of *Booth v. Clarke*, 17 How. 322, I think there is much doubt whether the complainant as a receiver, an officer of a state court, has any such standing in a court of the United States sitting in bankruptcy as entitles him to its aid in a case like this, seeking a preference in contravention of the intent and policy of the bankrupt act. Outside of the jurisdiction which appoints him, a receiver is not ordinarily entitled to maintain suits except by comity; and this comity does not extend to aiding preferences sought to be acquired by statutory assignments or other proceedings *in invitum*, to the detriment of other creditors whose interests are in the keeping of foreign or independent tribunals. *Booth v. Clarke*, 17 How. 322; *Brigham v. Luddington*, 12 Blatchf. 237, 242; *Chandler v. Siddle*, 10 N. B. R. 236; *Willitts v. Waite*, 25 N. Y. 577, 587; *Hoyt v. Thompson*, 5 N. Y. 320; *Runk v. St. John*, 29 Barb. 585; High, Receivers, § 156; *Betton v. Valentine*, 1 Curt. 168; *Hope Mutual, etc., v. Taylor*, 2 Robt. 278, 284.

In *Booth v. Clark* this question was elaborately considered in the supreme court of the United States. The case there was analogous to the present, except that the suit by the New York receiver was there brought in the District of Columbia, and also except that in that case no fraudulent assignment intervened requiring, as in this case, a further judgment of the court in aid of the receiver's title. In a lengthy opinion, *Swayne, J.*, says:

"We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit. He is not within that comity which nations have permitted, etc. * * * A receiver is appointed under a creditor's bill for one or more creditors, as the case may be, for their benefits, to the exclusion of all other creditors of the debtor, if there be any such as there are in this case. Whether appointed, as this receiver was, under the statute of New York, or under the rules and practice of chancery, as they may be, his official relations to the court are the same. * * * He has no extra-

territorial power of official action; none which the court appointing him can confer with authority to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court *or another jurisdiction*, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek. * * * If he seeks to be recognized *in another jurisdiction*, it is to take the fund there out of it without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks for his faithful conduct and official accountability." Pages 335-339.

Towards the close of the opinion it is intimated that if the receiver's title had rested, not merely upon the law or practice of the local courts in the collection of debts, but upon an actual assignment of the claim by the debtor himself, prior to the bankruptcy, by some instrument universally recognized as passing a title to property, the decision might then have been different. *Graydon v. Church*, 7 Mich. 36. This distinction would not benefit the complainant in this case, as no such assignment has ever been made to him. The plaintiff here has no right or title of his own; he is a mere officer of another court, seeking, through a judgment to be obtained in this, an independent tribunal, to enforce and make available certain proceedings *in invitum* against the judgment debtor in another jurisdiction, for the exclusive benefit of a single creditor. For many purposes the courts of the states and those of the United States are treated as foreign to each other, although sitting within the same territorial limits. *Walsh v. Durkin*, 12 Johns. 99; *Baldwin v. Hale*, 17 Johns. 272; *Tarbell v. Griggs*, 3 Paige, 209; *White v. Whiteman*, 1 Curt. 494; *Stanton v. Embury*, 93 U. S. 548, 554; *Latham v. Chafee*, 7 FED. REP. 520. In *Pennoyer v. Neff*, 95 U. S. 714, 732, the court say: "While they are not foreign tribunals in their relations to the state courts, they are tribunals of different sovereignty exercising a distinct and independent jurisdiction."

The United States district court of this district, sitting in bankruptcy, is charged with the protection of the interests of creditors of the bankrupt throughout the whole country. Its discharge of the bankrupt here is operative in all the states; and, as the interests which the court is charged with protecting are not local, but national, there would seem to be no good reason why a United States court in bankruptcy, sitting in this state, should be bound to aid an officer of a state court in securing a preference over other creditors, any more than if the bankruptcy proceedings happened to be in a similar court

charged with the same duties and in favor of the same creditors, sitting in a state adjoining, or in the District of Columbia. If the assets sought by the bill are within the control of this court, an independent jurisdiction, then the same reasons exist for refusing to aid the complainant in appropriating them to the exclusion of the whole body of creditors who are entitled to the protection of the court in bankruptcy, wherever sitting, as much as if the assets were in the District of Columbia. The case might be different if the complainant had ever become so vested with the absolute title to the property as to need no further adjudication to determine his rights or to make them available. Instead of that being the case, it is only in and through a further judgment of some competent court that it can be ascertained whether he has any right or title whatsoever.

On the other hand, section 4979 and other sections of the bankrupt law indicate a policy to permit, if not to require, all adverse claims upon the bankrupt estate to be adjudicated in the courts of bankruptcy. If, therefore, the receiver had, prior to the bankruptcy, a complete legal title to the property transferred to Tanner, or even a complete and perfect legal lien upon it, recognizable by general law, then it would seem that the court in bankruptcy is the proper forum in which to assert his title or lien, and that it ought to be there fully recognized and enforced; while, if his title or his lien is imperfect or inchoate only, he cannot be entitled to any aid from this court or any other court to perfect it, against the interests of other creditors, after the commencement of proceedings in bankruptcy, and the vesting of the property in the bankrupt's assignee under section 5046.

The essential point in the decision of *Booth v. Clarke* is that a receiver's title to property not reduced to possession and not supported by any assignment from the debtor, is not such a title as will prevail in independent tribunals against the interests of other creditors entitled to its equal protection; and if this doctrine is applied as regards the undisputed property of the debtor, it would seem to be still more applicable to cases where a fraudulent assignment stands in the receiver's way, and the preliminary judgment of this court is required in aid of his alleged title.

3. Aside, however, from the question of the receiver's standing in this court in such a suit as this, it is clear that he cannot maintain this action except upon the basis of his holding the legal title to the assigned property by virtue of the order of the state court appointing him receiver prior to the commencement of the proceed-

ings in bankruptcy. Unless at that time he already held the title, it became by section 5046 "vested" in the assignee in bankruptcy, and no subsequent suit would avail him; nor, unless he had some title paramount to that of such assignee, could he maintain any action to set aside the voluntary assignment after the appointment of the assignee in bankruptcy, as the supreme court has held that right to be vested exclusively in the latter. *Glenny v. Langdon*, 98 U. S. 20, 27; *Trimble v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301.

The plaintiff claims that the order appointing him receiver invested him *instantly* with the title to this property, on two grounds: *First*, because the voluntary assignment had become under the state law absolutely "void" for want of schedules being filed as required; *second*, because it was made with an actual intent to defraud creditors.

When this case was previously before the court upon demurrer to the bill of complaint (19 N. B. R. 178) it was assumed that the assignment was absolutely void under the state law, according to the allegations of the bill, which the demurrer admitted; and, the title being therefore legally in the debtor, that the appointment of the plaintiff as receiver transferred the debtor's title to the receiver as in ordinary cases, (*Porter v. Williams*, 5 Seld. 142,) and consequently that his title was antecedent and paramount to that of the assignee; and the demurrer was therefore overruled.

It now appears that the assignment was executed and delivered on March 28, 1877, and that, by the state law then in force, a failure to file schedules as directed by the statute did not invalidate the assignment. *Brennan v. Willson*, 71 N. Y. 502; *In re Croughwell*, 17 N. B. R. 337; *Thrasher v. Bentley*, 59 N. Y. 649; *Hardmann v. Bowen*, 39 N. Y. 196, 199. The act of 1877, making assignments "void" if schedules were not filed within 30 days after the assignment was executed, was not passed until June 16th, nearly three months after this assignment was made. Section 28 of the latter act (Laws 1877, chapter 466) repeals prior acts, but declares that this repeal "shall not affect any proceedings had; and any proceedings pending under the act hereby referred to may be continued under this act." But as 30 days after the assignment of March 28th had already expired long before June 16th, when this act was passed, the new act could not possibly be applied in that particular to the assignment in question. The act declares that the repeal of former acts shall "not affect any proceedings had." One of the "proceedings already had" in this case was the vesting of the title to this property in the assignee without liability

to be defeated through any mere delay in filing schedules. This title must therefore necessarily stand, under this language of the act, unless something else in it plainly defeats the title. The subsequent provision, that "proceedings pending *may* be continued under this act," is, it seems to me, wholly insufficient to defeat it. The language is permissive, and does not indicate any purpose of defeating any former assignments for such a cause. The act contains no regulation or direction in regard to pending assignments in which more than 30 days have already elapsed without schedules being filed; and the validity of such assignments must therefore be judged according to the prior acts, and under these the assignment, as we have seen, was not void.

The title to this property being therefore in the voluntary assignee at the time the receiver was appointed, through a deed valid as between the parties to it, the question remains whether, assuming that the assignment was fraudulent as to creditors, the receiver, upon his appointment, acquired *ipso facto* the title to the assigned property, or only a right of action, as representative of the judgment creditor, to procure it to be adjudged invalid in a suit instituted for that purpose. If the latter is all that the receiver acquired by his appointment, then, as he failed to institute any such suit till long after the commencement of proceedings in bankruptcy, the property had, by virtue of section 5046 and section 5044, already vested in the assignee in bankruptcy prior to the filing of this bill. *Miller v. O'Brien*, 9 Blatchf. 270; *In re Wynne*, 4 N. B. R. 25. The complainant was appointed receiver in proceedings supplementary to execution under the Code of Procedure as it existed prior to the amendment of 1880. These proceedings were adopted as a substitute for the former creditor's bill, to reach assets of a judgment debtor after execution returned unsatisfied, and the practice under the Code is in most respects substantially the same as formerly existed, except in matters of form. The Code authorized a receiver to be appointed "of the property of the judgment debtor," (old Code, § 298; new, § 2464,) just as a receiver was formerly appointed in the simplest form of a creditors' bill brought against the judgment debtor alone. The Code did not define the powers or duties of such a receiver, but adopted them as they existed in the former practice. By that practice such a receiver became vested, by the order appointing him, with all the property and effects of the debtor which he had in his possession or under his control; but not with property to which the debtor had himself no title, but which he had conveyed to another in fraud of creditors. To have

the receivership reach such property it was necessary that the creditors' bill should be of broader scope, including the fraudulent grantee as a party defendant, and assailing the fraudulent transfer itself. The receiver appointed in such an action became a receiver of the property described in the bill, and vested with the title as against all the parties to the cause. *Browning v. Bettis*, 8 Paige, 568; *Cassilear v. Simons*, Id. 273; *Green v. Hicks*, 1 Barb. Ch. 309; *Van Alstyne v. Cook*, 25 N. Y. 489, 496; *Edmeston v. Lyde*, 1 Paige, 637. In the case last cited, the chancellor, speaking of creditors' bills, says:

"When the property has been fraudulently assigned by the debtor, so that he has no legal or equitable rights as against the assignee, it will be necessary to make the assignee a party to enable the court to reach the property in his hands. A decree against the fraudulent assignor *would not in that case give any right to the property in the hands of the assignee*. But when the debtor still retains the legal or equitable interest in the property, such interest may be conveyed to the complainant, or transferred to a receiver under the decree or order of the court."

Unless the fraudulent grantee had been thus made a party to the bill, and the transfer directly assailed, the receiver was liable to an action of trespass for meddling with the property fraudulently transferred, and his appointment as an officer of the court would not be suffered to protect him. *Parker v. Browning*, 8 Paige, 388. If property claimed by the judgment debtor was in the possession of another person making claim to it, a receiver would be appointed who might bring suit to try the contested right, representing in that case the judgment debtor only, (*Chipman v. Sabbaton*, 7 Paige, 47;) but, so far from there being under the former practice any recognition of a title in a mere receiver, who was appointed upon a bill against the judgment debtor alone, to property which the debtor did not own, but had conveyed away in fraud of creditors, it was to the very last doubted by the chancellor whether such a receiver had any right even to file a bill to impeach such a conveyance. It was for the judgment creditor himself to pursue this remedy. *Green v. Hicks*, 1 Barb. Ch. 309, 314.

Since the Code, upon the same doubts, such bills have been dismissed as unauthorized, (*Seymour v. Wilson*, 16 Barb. 294; *Haynor v. Fowler*, 16 Barb. 300,) and in *Hyde v. Lynde*, 4 Comst. 387, *Bronson*, C. J., says: "A receiver of the effects of such a [fraudulent] grantor could not avoid the grant." Page 393. In the case of *Porter v. Williams*, 5 Seld. 142, it was, however, finally determined that the re-

ceiver, *as the representative of the creditor*, might maintain such a bill to impeach the fraudulent conveyance as the creditor himself might have done. The ground of the right of action thus allowed is not that the receiver already has the title to the property, but only that he represents the creditor, and as such has a right to assail the fraudulent grant by suit. The creditor, however, has no title to the property, nor has he even any lien upon it, until he files his bill, or levies his execution if the property be chattels. *Lawrence v. Bank of Republic*, 35 N. Y. 320.

As stated before, the Code adopted the former practice as to receivers, with no substantial enlargement of their powers. By the old Code, § 298, the receiver, on filing the order appointing him, is vested "with the property and effects of the judgment debtor." Section 299 (see new Code, § 2447) expressly declared that "if it appear that a person alleged to have property of the judgment debtor claims an interest in the property adverse to him, such interest shall be recoverable only in an action against such person by the receiver." Accordingly, the unqualified language of section 297, which authorized the court to apply to the satisfaction of the judgment "any property of the judgment debtor in the hands of himself or any other person," has been construed to mean only property of which the debtor was the unquestioned owner, not including property fraudulently conveyed. *Rodman v. Henry*, 17 N. Y. 484; *Lathrop v. Clapp*, 40 N. Y. 328, 333. The same construction and the same limitation would seem to be applicable to the same words of section 298, which purport to vest the receiver "with the property and effects of the judgment debtor," so that they cannot be held to effect any transfer, *ipso facto*, of a present title to property which has been conveyed by the debtor in fraud of creditors.

The uniform course of adjudication since the Code is to the same effect, wherever the question has been really presented. If the receiver, by virtue of his appointment, were *ipso facto* vested with the title to such property, the proceedings appointing him would be a good defence to an action of trespass for taking the property. Where the receiver obtains a title direct from the judgment debtor it has been held that he can maintain trover for conversion of the property. *Wilson v. Allen*, 6 Barb. 542. But as respects property fraudulently assigned by the debtor, he has no such title as will protect him against an action of trespass.

In *Brown v. Gilmore*, 16 How. Pr. 527, this precise question arose in a suit for trespass where the defendants, the agents of a receiver,

undertook to justify by pleading the receiver's authority, and alleged title to the property taken. *Emott, J.*, says:

The defendants have not the right to litigate that question in the present action, but only the validity of the sale *inter partes*. The receiver not only stands in the place of the debtor, but represents creditors, and can, therefore, in a proper way impeach fraudulent acts of the debtor; but in neither capacity could the receiver justify the forcible seizure of this property if it had been sold to the plaintiff by an actual and complete transfer, so as to make a valid sale between him and his vendor. The receiver could not question such a transfer as representing the judgment debtor. * * * nor could such a defence be interposed in this suit by this officer as representing the creditors; because this property, even if transferred with a design to delay and defraud them, did not for that reason belong to them, so that they or their representatives could exercise an immediate control over it. * * * Until an execution is levied upon personal property the judgment creditor has no right in it or control over it. But the receiver *does not stand in the place of an execution*. The only way he can intervene in behalf of creditors in such cases is by instituting a suit to impeach and set aside the validity of such transfers.

To the same effect is *Teller v. Randall*, 40 Barb. 242, and *People v. King*, 9 How. (N. Y.) 97.

In *Bostwick v. Menck*, 4 Daly, 72, *Robinson, J.*, says:

"The fraudulent assignor could not impeach his own assignment, nor could any other person do so except as a creditor by judgment, after execution thereon had been returned unsatisfied, who should by his own suit, or through a receiver appointed in his behalf, evince his dissent thereto by assailing it in a direct proceeding instituted for the purpose of avoiding it."

In the superior court it has been still more explicitly decided that the receiver has no title nor *lien* in respect to such property until the commencement of his suit. *Fields v. Sands*, 8 Bosw. 685; *Conger v. Sands*, 19 How. (N. Y.) 8.

In *Fields v. Sands* the court say:

"Such proceedings (supplementary) no more create a lien upon the assigned property than would a judgment creditor's suit against the debtor only. Such proceedings do not affect property vested in a third person. * * * The receiver merely obtains authority to litigate the validity of the transfer by a suit against the assignee."

In *Bostwick v. Menck*, 40 N. Y. 383, the receiver had been appointed upon a small judgment of \$200. In setting aside a fraudulent assignment he had recovered by the judgment below the whole assigned property, some \$15,000, upon the theory that he was vested with the title of the whole property in trust for all the creditors. This judgment was reversed, and his recovery limited to the amount of the

judgment on which he was appointed. The question necessarily involved the nature and extent of a receiver's claim, by virtue of his appointment as receiver, upon property fraudulently assigned. In the opinion of the court, *Grover, J.*, says:

"He acquires no right to the property (fraudulently assigned) by succession to the rights of the debtor; * * * no rights (*i. e.*, of property) other than those of the debtor are acquired. *He does not acquire the legal title to such property by his appointment. That is confined to property then owned by the debtor*; and the fraudulent transferee of property acquires a good title thereto as against the debtor and all other persons, except the creditors of the transferor. *The only right of the receiver is, therefore, as trustee of the creditors. The latter have the right to set aside the transfer and to recover the property from the fraudulent holder; and the receiver is by law invested with all the rights of all the creditors represented by him in this respect. It is clear that the right of the receiver, representing the creditors and acting in their behalf, is no greater than that of the creditors.*" "They, (the assignees,)" he continues, "have the right to retain the property until the superior right of creditors to divest them of it is shown. This right of creditors they have the right to litigate in respect to each creditor." Pages 385, 386.

In the court below it was not held that the receiver took title to such property upon his *appointment*, but only "upon the court declaring such transfer void." *Bostwick v. Beiser*, 10 Abb. 197. Not only is the whole reasoning and language of the opinion in the court of appeals very clear that no title vested in the receiver to such property by the mere fact of his appointment, but the decision that the receiver can recover only sufficient to satisfy the particular debt set forth in the bill, is incompatible with his having any general title to the whole assigned property; and if he has no title to the whole, there is no specific part which he can separate from the rest to which he can lay any claim of title.

Such fraudulent transfers, therefore, are no more absolutely void as respects such a receiver than as respects judgment creditors themselves. They are avoidable only when assailed at the election of the creditor or receiver, in an action brought for the specific purpose of setting them aside. High, Rec. § 411. "There is nothing in this respect that a receiver might do that the creditor himself cannot do." *Dollard v. Taylor*, 33 Superior Ct. R. 496, 498. In *Becker v. Torrance*, 31 N. Y. 637, the court say "the officer [court] could do nothing except to appoint a person [receiver] who should represent creditors by commencing and prosecuting such a suit." And in *Underwood v. Sutcliffe*, 77 N. Y. 62, *Andrews, J.*, says:

"A receiver is regarded as the representative of the creditor in whose behalf he is appointed for the purpose of maintaining an action to avoid fraudulent transfers by the debtor of his property. He may disaffirm his acts, and in doing so he acts as the trustee for creditors."

From this examination it seems clear that a receiver appointed in supplementary proceedings cannot be held to be vested, by virtue of his appointment, with the title to property fraudulently conveyed by the judgment debtor. The court which appoints him cannot, as we have seen, put him in possession of such property. It will not authorize his meddling with it, nor protect him if he do so. If he interfere with it by his own act, or that of his agents, he is liable as a trespasser for its value. He may assail the fraudulent transfer by action, as the creditor himself might do, and not otherwise; and he cannot recover more than the individual creditor could recover in a similar action. He may take no steps to set the fraudulent transfer aside until long after his appointment. In the present case it was nearly six months afterwards. Dealings with the property by the voluntary assignee, in the mean time, are valid. Sales pass a good title to the purchaser, (*Barney v. Griffen*, 4 Sandf. Ch. 652; *Wakeman v. Grover*, 4 Paige, 42; *Pine v. Rikert*, 21 Barb. 469; *Okie v. Kelly*, 12 Pa. St. 323, 327;) and even the proceeds of such sales, if disbursed according to the terms of the assignment, cannot be reached, nor the assignee held accountable therefor. *Averill v. Loucks*, 6 Barb. 477; *In re Wilson*, 4 Bank. 430; and cases last above cited. All the essential attributes of a title, or even of a specific lien, in the receiver during that period are therefore wanting, for a specific lien could not be thus divested. *Murray v. Ballou*, 1 Johns. Ch. 577, 580; *Sheridan v. Andrews*, 49 N. Y. 480-483. His right is a right of action only, like that of the creditor whom he represents. He has no title until so adjudicated, or until he is appointed receiver in an action brought to set aside the conveyance. If he sleep upon his rights they will be lost. Until he acquires title or a specific lien by such a suit, his right of recovery is liable to be defeated by the same contingencies which would defeat a creditor pursuing the same remedy. Among these contingencies are a prior sale and distribution of the property by the assignee, a levy by any other execution creditor, (*Storm v. Waddell*, 2 Sandf. Ch. 494; *Cuyler v. Moreland*, 6 Paige, 273; *Lansing v. Easton*, 7 Paige, 364; *Storm v. Badger*, 8 Paige, 129; *Becker v. Torrance*, 31 N. Y. 631; *Davenport v. Kelly*, 42 N. Y. 193; *In re Pitts*, 9 Fed. Rep. 542,) or an adjudication in bankruptcy.

Such an adjudication prior to the filing of the bill operates as an immediate sequestration of the debtor's effects to the use of creditors, and cuts off the receiver's inchoate right of action as it does that of the creditor himself. *Johnson v. Rogers*, 15 N. B. R. 1. Up to that time the receiver in this case had done nothing evincing any dissent to the assignment. As receiver he might have already acquired other property belonging to the judgment debtor sufficient to satisfy the judgment upon which he was appointed receiver; and in that case he would have had no inducement, nor even any legal right, to assail the questionable title of an alleged fraudulent grantee; or he might doubt his ability to make such an attack successfully. Though voidable, the fraudulent transfer was not void; and it might be acquiesced in by him, or by the creditor whom he represented, at his election. *Rapalee v. Stewart*, 27 N. Y. 310; *Babcock v. Dill*, 43 Barb. 577.

The title to this property, therefore, necessarily remained in the voluntary assignee until it was legally avoided, or until due legal steps were taken by the receiver for that purpose; and no lien could be acquired by the receiver until he gave notice of his election and intention to avoid it, or by suit brought for that purpose. *Weed v. Pierce*, 9 Cow. 728, 729; *Becker v. Torrance*, 31 N. Y. 636, 639; *Okie v. Kelly*, 12 Pa. St. 323; *Field v. Sands*, 8 Bosw. 685; *Conger v. Sands*, 19 How. Pr. 78.

Before any such steps were taken the right to the property was, by section 5046, vested in the assignee in bankruptcy and thereafter the latter, according to the decisions of the supreme court above cited, had the exclusive right to take proceedings to avoid the assignment.

4. To warrant the court in setting aside an assignment for the equal benefit of all creditors, at the suit of one creditor seeking to appropriate the whole assets to his own claim, the proofs of fraudulent intent must be clear and convincing. Prominent among the proofs urged in this case is the fact alleged that the debtor, by means of an answer without merits and through dilatory proceedings, delayed the recovery of the creditor's judgment as long as it was in his power, and made the assignment only at the last moment prior to the recovery of the judgment, which could no longer be postponed. An assignment under such circumstances for the equal benefit of creditors, or a petition in bankruptcy, was rather the duty of the debtor than evidence of fraudulent intent. 2 Spence, Eq. Juris. 350; *Mayer v. Hellman*, 91 U. S. 500; *Hauselt v. Vilmar*, 2 Abb. (N. C.) 222. If the assignment is legally complete and perfect, and is intended to devote, and does

devote, all the debtor's property to the payment of his debts, it cannot be invalidated through the subsequent remissness or inefficiency of the assignee. Creditors have ample remedy against the assignee for his misconduct, if any; and they should be held to these remedies, rather than be allowed to subvert the assignment on the claim that such remissness is an evidence of original fraudulent intent. *Hardman v. Bowen*, 39 N. Y. 196, 200; *Schults v. Hogan*, (N. Y. Ct. of App.) 12 N. Y. Weekly Dig. 463. This principle covers most of the other objections urged against this assignment. They relate almost exclusively to the subsequent conduct of the assignee. The assignee was a son-in-law and clerk of the debtor. His business had been that of carrying on a tannery. At the time of the assignment there was considerable stock, in the various stages of manufacture, and an outstanding contract of the debtor for the manufacture of leather for mail-bags, which it was deemed prudent to fulfil. For this purpose the assignee had a right to continue the employment of the hands then about the tannery and also to employ the assignor. I do not find from the evidence that the business was continued beyond what was necessary in fulfilling this contract, and working up the stock on hand, or that this was disadvantageous to the estate. The debtor had also, the year prior to the assignment, given to the assignee a chattel mortgage, which was a second lien upon his stock in trade, and which was doubtless invalid as against an execution creditor; and shortly before the assignment he had also given him a bill of sale of some other articles unencumbered. From the testimony of the assignee, who was called by the complainant, a full and valuable consideration for both of these was proved.

The change of possession was all that the circumstances required. The assignment was immediately recorded, and was notorious. The assignee swears he took immediate possession. He notified the hands, and paid them; he bought and sold goods, and advanced his own moneys in part upon necessary purchases; he changed his bill-heads; opened a new set of books as assignee, and a new bank account where deposits were made.

The real estate of the debtor was mortgaged to its full value, and was afterwards foreclosed without any surplus. For such portion as was occupied by the debtor, it was proved that he accounted to the assignee for its full rental value.

The evidence discloses a number of details of an unsatisfactory character. Information given by the assignee was in several particulars less definite than he ought to have been able to furnish. The

winding up of the business was in a considerable measure entrusted to the assignor, who was employed by the assignee; but I do not find sufficient evidence to show that the assignor was either overpaid for his services, or that the assignment was made, or was intended to be made, subsidiary to his own purposes. Whatever errors existed seem to me errors in management rather than in anything belonging to the assignment in its inception. The plaintiff shows various circumstances raising doubts of good faith, but he called the defendants as his own witnesses. He is bound by their answers where not shown erroneous, and they have given their answers to such suspicious circumstances. The proofs do not go beyond suspicion, and this is not enough. The bonds required from the assignee furnish security to the creditors for a true account by him of the assets coming to his hands, or with which he is justly chargeable, and for the faithful discharge of his duties.

I do not think I should be justified, either upon the law or the facts, in setting the assignment aside as fraudulent against creditors, and the bill must therefore be dismissed, with costs.

ALLEN & Co. v. THOMPSON.

(*District Court, W. D. Tennessee.* January 7, 1882.)

1. BANKRUPTCY—VACATING DISCHARGE—WANT OF NOTICE—REV. ST. § 5109—JURISDICTION—WHAT PETITION SHOULD SHOW.

If no notice be given to the creditors of the separate application for a discharge, as required by Rev. St. § 5109, the certificate of discharge will be vacated on petition of the creditors. The district court has inherent power, by necessary implication, from the statute to entertain a petition for that purpose. *It seems* that the petition should show a ground for withholding the discharge if set aside, but it was not for special reason required in this case.

2. SAME—PARTNERS—OPPOSING DISCHARGE—WANT OF JURISDICTION IN THE COURT—BANKRUPT NOT A RESIDENT NOR DOING BUSINESS IN THE DISTRICT—OBJECTION, WHEN MUST BE TAKEN—WHEN WAIVED.

The creditors, when notified that bankruptcy proceedings have been commenced, must promptly, by a motion or petition to vacate the adjudication, object to the jurisdiction of the court, or the objection is waived. They cannot prove their debts, appoint an assignee, distribute the estate, use the proceeds for their benefit, and for the first time object to the jurisdiction in opposition to the discharge. An application to vacate the certificate for want of jurisdiction of the original bankruptcy petition by copartners, because one of the members of the firm did not reside within, or the firm do business within, the district, as required by statute, was denied. These facts will be presumed in favor of the jurisdiction, however the truth may be, especially if the petition defectively states enough from which jurisdictional facts may be inferred.

In Bankruptcy.

Petition to set aside and annul a certificate of discharge filed by a creditor against the bankrupt, to which he has demurred. The petitioners allege that a final discharge was granted on the ninth day of June, 1881, but that the register's certificate of conformity was premature, because of a failure to comply with certain prerequisites required by law in the course of the proceedings. The grounds alleged for setting aside the discharge are as follows:

(1) That Thompson was not a resident or citizen of this district, and the court had not jurisdiction. (2) That he has never filed schedules of his individual liabilities and individual assets, as required by Rev. St. § 5014 *et seq.* (3) That petitioners, as *individual* creditors of Thompson, were never served with any notice, as required by Rev. St. § 5019, and that this failure to file schedules of his individual creditors and assets makes the order of adjudication illegal as to his individual debts. (4) That no notice was given or publication made to the creditors who had proved their debts of Thompson's application for discharge, as required by Rev. St. § 5109, and that petitioners having proved were entitled to notice, and had none of the application for discharge. (5) That his assets did not pay the required per centum, nor did he have the required assent

The demurrer takes objection on the following grounds:

(1) The petition does not allege the discharge was fraudulently obtained. (2) The particular grounds required by Rev. St. § 5110, for withholding a discharge, are not specified. (3) No one of the particular grounds for annulling a discharge, required by Rev. St. § 5120, is specified. (4) It is not alleged that the petitioners did not have full knowledge of the acts alleged for avoiding the discharge before the same was granted. (5) The first specification does not aver that the firm of Lonsdale & Thompson, by which the petition was filed, did not do business within six months next preceding the bankruptcy petition in this district. (6) The second specification does not aver any ground for avoiding a discharge. (7) The third specification does not aver that the notice prescribed by the court under section 5019 was not given, nor that the marshal did not mail to them the notice required to be given, and does not show any ground for avoiding a discharge. (8) The fourth specification sets forth no ground known to the law for avoiding a discharge. (9) The fifth specification sets forth no ground for avoiding the discharge.

George W. Gordon, for the creditors.

Gantt & Patterson, for the bankrupt.

HAMMOND, D. J. The demurrer makes the mistake of treating this petition as one filed under section 5120 of the Revised Statutes, being section 34 of the original act. If it is to be tested by the requirements of that section the demurrer is well taken; but it is not. The petitioner invokes the jurisdiction of the court to correct a decree

improvidently granted, not entirely because of irregularities, but because the decree is void for want of jurisdiction to make it. I shall not stop to inquire how far, conceding the jurisdiction of the court, the petitioners may go in the correction of mere irregularities in the bankruptcy proceedings by a petition of this character, because treating the demurrer as if it challenged the right to do this, it cannot be sustained for the reason that it is too broad and goes to the whole petition, as well that part which attacks the jurisdiction to grant the discharge as that which seeks to avoid it for irregularities. Indeed, I think the petition itself only sets out these irregularities as averments of facts showing a want of jurisdiction to grant the discharge; and whether so intended or not that must be its legal effect, for I take it that mere irregularities can only be corrected, while the case is pending, by this court itself, or the circuit court, on a supervisory petition, as other errors are corrected in bankruptcy proceedings, and not otherwise. There is no prayer to correct errors in that sense, but one to annul the discharge for want of jurisdiction, and I shall treat the petition as filed for that sole purpose.

The record of the bankruptcy proceedings, furnished me by counsel with their briefs, does not contain the original petition in bankruptcy, and if I could look into it all in determining this demurrer, I do not now know what are its averments. This petition does not show, but only states, that he was not a resident or citizen of this district. I infer from what is alleged in this petition that the bankruptcy petition was the copartnership petition of Lonsdale & Thompson. This petition to set aside the discharge assumes that as to the *individual* liabilities of Thompson there can be no discharge, unless he was a resident or citizen of this district, and that a failure to file schedules of his individual debts and assets renders a decree granting him a discharge void for want of jurisdiction. The creditor filing this petition to annul the discharge was, as appears by the petition itself, a creditor of the firm as well as a creditor of Thompson individually, and he actually appeared and contested Lonsdale's right to a discharge by filing specifications in opposition to it, which were decided in favor of the bankrupt. Having procured from the clerk the original petition, I find that it avers that "the petition of John G. Lonsdale, Jr., of the county of Shelby and state of Tennessee, and George C. Thompson, of the parish of Carroll and state of Louisiana, respectively composing the firm of Thompson & Lonsdale, and district aforesaid, respectfully represents that the said John G. Lonsdale, Jr., and George C. Thompson, copartners, transacting business at Memphis, in the county of

Shelby and state of Tennessee, in said district, have resided, as aforesaid, for six months next immediately preceding the filing of this petition, etc." There are attached to the petition schedules purporting to be those of the firm liabilities and assets, and of John G. Lonsdale's individual liabilities and assets, but nothing purporting to be schedules of Thompson's individual liabilities and assets.

From this analysis of the petition we are now considering, and this statement from the record, it will be seen how inartificial and defective it is, considered as one to set aside the discharge and supersede the proceedings for causes not mentioned in section 5120 of the Revised Statutes. If this demurrer should be sustained because of these defects the petition could be amended, and although it does not set out the original bankruptcy proceedings in so full a manner as to raise all the questions involved, nor make the record an exhibit, as it should do, I have, in pursuance of my habit to wind up the old bankruptcy business of this court as best we can, concluded to treat the petition as if the record were an exhibit to it, and as if it were more specific in the allegations based upon that record, though I think such a practice wholly subversive of orderly procedure. But we never had, in this court, any rules regulating the practice in bankruptcy, outside of the general orders of the supreme court, and I know, from my own experience at the bar, how difficult it was for a lawyer to determine how to proceed in their absence in matters not regulated by the statute or general orders. Since the repeal of the act it would be useless to prescribe rules, and there is excuse for not too much scrutiny of informalities of the kind mentioned.

The demurrer admits the facts stated to be true, and the first question is whether a creditor who has proved his debt can, at this stage of the proceedings, object to the jurisdiction of the court to grant the discharge. The jurisdiction is denied on two grounds, essentially different in their character: *First*, the creditor alleges he had no notice, and none was given to him or other creditors who had proved their debts, of the application by Thompson for a discharge, as required by section 5109 of the Revised Statutes, which enacts:

"Upon application for a discharge being made, the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication, at least once a week, in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt." Rev. St. § 5109.

On this branch of the case it will be important to determine whether a failure to give this notice operates to render the decree granting the discharge void, or whether it is only voidable on showing some ground for which it should have been withheld if properly presented before granting the discharge. *Secondly*, the creditor attacks the jurisdiction of the whole bankruptcy proceeding at the point of the original petition by alleging that the bankrupt was not a citizen or resident of this district, but of Louisiana.

It will be seen from what has been said how important to every person holding a certificate of discharge in bankruptcy, and to all holding claims against them, are the questions raised by this petition. Here is a creditor, after the discharge is granted, attacking it as void for want of jurisdiction, or for irregularities that necessarily reopen the whole case, and compel us to go over it again, to determine not only the question of jurisdiction, but many other matters pertaining to the proceeding, and this, too, at the suit of a creditor who proved his debt, and took part in the proceedings without making this objection that he now sets up. Can this be done, and if so, under what limitations or restrictions? It is sometimes, indeed very often, said loosely that it is never too late to take objection to the jurisdiction of a federal court, and there is not wanting a kind of judicial sanction for the notion that in determining questions of jurisdiction in these courts a more strict rule is to be applied than to other courts, and that they must be treated with that degree of scrutiny that is applied to jurisdiction obtained by extraordinary process, or to that belonging to courts of extraordinary powers. I dissent entirely from this view, and while we are constrained by authority in that class of cases where jealousy of these courts has resulted in very strict construction of their jurisdiction, and the mode of obtaining it, the principle does not at all apply in bankruptcy, admiralty, and other proceedings of which they have exclusive cognizance, so far as pertains to jurisdiction over the persons or *res* involved in the litigation.

Entire want of jurisdiction over the subject-matter may be taken advantage of at any time, and it is never too late to make the objection; and it may be even collaterally attacked. Freeman, Judgments, § 120; *Id.* § 117 *et seq.* But where the objection goes merely to a want of jurisdiction of the person or the thing, there may be a waiver of the objection or restrictions as to the time and manner of making it; the judgment becomes not void, but only voidable, and presumptions are indulged in favor of the jurisdiction, unless it be made

to appear by direct proceedings that there was a want of it. *Id.* § 124. It is not necessary to go into the technical complications of this subject here, but only to advert to the distinction, that we may have it in mind in considering this case. There is another familiar principle, that no man shall be bound by a decree injuriously affecting his interests without notice of the proceeding, either actual or constructive, to be given as prescribed by law for the purpose of binding him.

Now, it is one of the peculiarities of our late bankruptcy practice that, in a case of voluntary resort to the court, an adjudication, and necessarily an implied judgment that the court has jurisdiction, follows upon the mere filing of the petition without notice to anybody. It is true, the register was required to examine the petition and schedules and certify to their formal compliance with the requirements of the law, and if he found them defective in jurisdictional averments there would be no adjudication; but as such a defect would rarely appear, the form of the petition being prescribed by the rules, ordinarily the objection to the jurisdiction would rest in facts contrary to the averments of the petition. It cannot be that creditors are precluded by a judgment so made from taking objection to the jurisdiction; but I do not think it follows from this, as has been adjudged, that the objection can be made at any time during the progress of the case, and in opposition to the discharge, or on petition to set the certificate aside. After the adjudication the very next step is to notify the creditors formally of the proceeding, and effectually to bind them to it. By this notice the creditors became parties to the proceeding in the sense that they are permitted to come in and protect their interest, and are precluded if they do not. To my mind the proposition that they may come in, prove their debts, choose an assignee, distribute the estate, and take all the benefit of the proceeding they can have, and then when the debtor applies for a discharge object that the court has no jurisdiction to grant it, is intolerable. Why should they not, when notified of the proceeding, in analogy to other cases, make objection to the jurisdiction in the beginning? And why, if they prove their debts without taking this objection, should they not be considered to have waived it? If it be conceded that, in cases at law or equity, where the record shows a want of jurisdiction on its face the objection may be taken at any time; on the other hand, if it show jurisdiction on the face the showing is conclusive, unless there be an objection taken by plea in abatement or otherwise *in limine*. But I am unwilling, for my part, to extend any principle that would permit a proceeding to be vacated for want

of jurisdiction, because the jurisdictional facts do not appear on the face of the pleading to these petitions in bankruptcy. We have entire jurisdiction of the subject-matter, and may acquire jurisdiction of the persons and the *res* under given conditions; and it does seem that there should be a presumption in favor of the existence of the conditions and the jurisdiction, unless parties notified at once and in the beginning point out the defects or non-existence of the jurisdictional facts by motion or petition to vacate the adjudication for want of jurisdiction. If this be not the rule in such cases it is manifest not only that the discharge will fail, but the court being without jurisdiction of the original bankruptcy petition all that is done under it is void; the assignment is vacated; all titles to property sold under it become worthless, and the purchasers from the assignee under the decrees of the court must lose it. These consequences are inevitable. I do not, therefore, deem it important to inquire whether the original petition, on its face, gives jurisdiction or not, though I think it defectively states enough on which to predicate jurisdiction, or whether this petition to annul the discharge states enough to show a want of jurisdiction; for, whether the original petition is defective or not, or whether the facts it states are untrue or not, I hold that this creditor having been notified, or having appeared and filed his proof of debt without in any form taking objection to the jurisdiction, has waived that objection, and he cannot now make it at all. There seems to be some doubt or confusion in reference to the place of filing a voluntary copartnership petition where the partners reside in different districts; and it is not clear what the facts about their doing business in this district were, but I think it is too late to go into that inquiry. Bump, (10th Ed.) 68, 776. Whether the defects and irregularities he points out are such as would sustain an objection to granting a discharge I do not determine, because if the discharge be vacated it only reopens the case and leaves the parties and the record as it was at the time it was granted, and it can be then determined what would be proper to be done in the case.

The next question is whether the discharge can be set aside for want of notice to the creditors, or any of them, of the separate application for discharge, as required by section 5109 of the Revised Statutes, already quoted. This is a different question from the other and depends on different principles. The court has jurisdiction to grant the discharge, but is it valid if this notice be not given, and may it be set aside by a proceeding like this?

This application for a discharge is so far an independent proceed-

ing that the statute requires special notice, and I think the failure to give it has somewhat the same effect that a failure to serve any original process would have in a suit at law or in equity. What that precise effect would be in a collateral proceeding may be doubtful. It was held in *Shelton v. Pease*, 10 Mo. 473, that the want of notice under the act of 1841 would not have the effect to avoid the discharge, and in *Linton v. Stanton*, 4 La. Ann. 401, that it would be inconsistent with the strong language of the act giving effect to the certificate of discharge to pronounce the decree a nullity for want of the prescribed notice. I do not, in the least, doubt that in all collateral proceedings, as suits like those, this is, under the act of 1867, more entirely true than under the act of 1841, and that the certificate is conclusive whether the record shows notice or not. But in a direct proceeding to vacate the decree granting the discharge this principle has no application. A creditor relying on this section may reasonably expect notice of the application for discharge, and if it be not given the debtor may obtain a discharge by escaping all opposition from his creditors. There must be some mode of vacating such a decree. The bankruptcy statutes do not prescribe any, and we are left to rely on that inherent power of all courts to correct such errors as this. At common law there were writs of error *coram nobis*, the *audita querela*, and perhaps other methods of procedure, and where these and writs of error or appeal, and the *certiorari* and *supersedeas*, were inadequate, a bill in equity could be resorted to for relief. It must be that the court granting such a decree is authorized to correct a proceeding that should be, at least in its own forum, a nullity. There is the greater reason for this since in all other courts the certificate is, by virtue of the statute, conclusive. There are abundant modes of doing such work in the state courts, and a mere motion often suffices. We are not embarrassed, in this court, by any limitation as to terms of court which are not known as to our bankruptcy jurisdiction. The English bankruptcy courts possessed plenary power to supersede the commission, as it was called, or correct such errors; and while we cannot claim, perhaps, all their powers in that direction, we may, unquestionably, assume that, by necessary implication, our statutes confer on these courts ample authority to undo this wrong in the administration of the act. The authorities sustain it, and I am content to merely cite them without comment on their particular application to this case. Freeman, Judgments, §§ 90-148; Hilliard, Bankruptcy, 406-414; *Ex parte Christy*, 3 How. 292, 312, 315; *Re Morris*, Crabbe, 70; *Re Walker*,

1 N. B. R. 386; S. C. 1 Low. 237; *Re Goodfellow*, 3 N. B. R. 452; S. C. 1 Low. 510; *Re Little*, 2 N. B. R. 294; S. C. 3 Ben. 25; *Re Dupee*, 6 N. B. R. 89; *Re Penn*, 3 N. B. R. 582; S. C. 4 Ben. 99; *Re Fogerty & Gerrity*, 4 N. B. R. 149; S. C. 1 Sawy. 234; *Re Thomas*, 11 N. B. R. 330; *Re Bergeron*, 12 N. B. R. 385; *Re Griffith*, 18 N. B. R. 510; *Re Hamlin*, 16 N. B. R. 522, 528.

Some of these cases would support the position that the discharge may be opposed or vacated by showing that the jurisdictional facts averred in the original bankruptcy petition are untrue, but I am not willing to assent to that doctrine, and must, for reasons I have stated, hold that the creditors, when they were served with notice of the filing of the petition, should have then promptly taken such steps as were necessary to complain of the jurisdiction, and that they cannot go on to the end and set up such an objection for the first time in opposition to the discharge, or by petition to vacate it. The only doubt I have in the matter of vacating this certificate for want of notice of the separate application for the discharge under section 5109, Rev. St., is whether sound practice does not require that a creditor moving to vacate it must, in analogy to our state practice in *certiorari* and *coram nobis* cases, show that he has been injured by setting out facts from which it will appear that the bankrupt is not entitled to a discharge on some ground the statute recognizes as a reason for withholding it. Why should this discharge be vacated only to grant another, or should the creditor be permitted to enter into a fruitless opposition? It is, no doubt, a better practice to require such a showing, and if I were to prescribe a rule of practice in such cases it would be so framed; but here there are the appearances of a fraud on the court in procuring this certificate, and inasmuch as this bankrupt never, so far as I can now see, filed any schedule of his individual assets and liabilities, nor gave any notice to these creditors, it may be that there should be steps taken to compel such schedules, appoint an assignee, and administer the estate; and in the progress of that administration there may be developments for which a discharge would be withheld. I shall not, therefore, in this case, require the petitioner to set out grounds for which the discharge should be withheld, but if on the hearing the want of notice should be shown as alleged, will, for that reason alone, reopen the case by vacating the discharge.

Overrule the demurrer in accordance with this opinion.

DECREE.

In the matter of LONSDALE & THOMPSON, Bankrupts.

The demurrer of the bankrupt George C. Thompson to the petition of Thomas H. Allen & Co., to vacate and annul the discharge of the said bankrupt, is sustained, so far as the said petition seeks to vacate the discharge for want of jurisdiction in the court to entertain the original bankruptcy petition; but so far as it seeks to vacate the discharge for want of notice to the creditors, under section 5109 of the Revised Statutes, of the separate application for discharge, the said demurrer is overruled, and the bankrupt has leave to answer the said petition within 10 days from this date, or it will be taken for confessed. All other matters are reserved.

PADDOCK, Assignee, v. FISH and others.

(District Court, S. D. New York. January 20, 1882)

1. BANKRUPTCY—FRAUDULENT CONVEYANCES—RIGHTS OF BONA FIDE PURCHASER OR ENCUMBRANCER.

A *bona fide* purchaser or encumbrancer of property conveyed in fraud of creditors is entitled to protection to the extent of the moneys advanced by him on the faith of the title, although his advances were made after the commencement of the proceedings in bankruptcy against the fraudulent grantor of which he had no knowledge.

2. SAME—SAME.

E. M. C., being insolvent, two months before proceedings in bankruptcy against him conveyed to his mother the house and lot where they both lived for a nominal consideration, and in reality for his own future use. A month afterwards he procured his mother to execute a bond and mortgage to his brother, designed to be sold in the market to raise money for the bankrupt's benefit. It was so sold by the brother in the usual course of such sales to L., a *bona fide* purchaser, who had no acquaintance with or knowledge of E. M. C., or his business or circumstances. The transaction was not closed nor the money paid until two days after the commencement of proceedings in bankruptcy against E. M. C. in another district. L.'s transactions were with the brother, and he had no knowledge or notice of the bankruptcy proceedings against E. M. C., or that the mortgage or the money raised upon it was designed for E. M. C.'s benefit. A part of the money paid by L. to the brother was applied to the payment of taxes on the property, and the rest afterwards paid by the brother to E. M. C. *Held*, that L. acquired a valid lien against the assignee in bankruptcy to the extent of the money paid for the mortgage, and that the plaintiff is remitted to his remedy for proceeds against the bankrupt.

3. USURY, MUST BE SPECIALLY PLEADED.

No question of usury being raised by the pleadings or at the trial, *held*, that it could not be considered.

In Equity.

Action by the plaintiff, as assignee in bankruptcy of Eugene M. Cammeyer, to set aside as fraudulent and void against creditors a mortgage for \$1,000 made by the defendant Sarah Fish to Augustus Cammeyer, and by him assigned to defendant Patrick Lambert. The facts, as admitted or proved, were as follows:

On the twenty-ninth of January, 1874, Eugene Cammeyer executed to his mother, Sarah Fish, a deed of the house and lot 151 Bergen street, Brooklyn, where they both lived, subject to a prior mortgage of \$4,000, for the consideration of \$10 and natural love and affection. The deed was at the time handed to his mother, who was told what it was. It was immediately taken back by Eugene, who kept it in his possession until he caused it to be recorded on March 6, 1874. Eugene Cammeyer was then in business in New York, had become embarrassed, and the conveyance to his mother was intended for his own future use. On the second of March, 1874, for the purpose of raising money for the benefit of Eugene, his mother executed the bond and mortgage in question for \$1,000 to Augustus Cammeyer, brother of Eugene, without consideration, which was recorded on the eighteenth of March, and was designed to be negotiated and money raised upon it by the sale and assignment of it to some purchaser. Similar sales of second mortgages were frequent at that time. It was offered by Augustus to the defendant Lambert at a discount of 15 per cent., who examined the property himself, and employed his son, an attorney, to examine the title, and both being found satisfactory, Lambert, on the twenty-first of March, paid \$850 and received from Augustus Cammeyer an assignment of the bond and mortgage, which was recorded on that day. The assignment contained an express covenant that the whole amount of the mortgage was owing upon it, and that there was no defence or offset thereto. Of the \$850, \$114.50 was applied at the time of the assignment in payment of taxes upon the property for the year 1873, and the balance, \$735.50, was paid over to Augustus Cammeyer, by whom it was given to Eugene.

Lambert was a builder in Brooklyn, accustomed to buy second mortgages, and 15 per cent. discount was not an unusual rate at that time. Lambert had no previous acquaintance with or knowledge of either of the Cammeyers or Mrs. Fish, and no knowledge of the business of Eugene in New York, but was informed that they lived with their mother in the house in question. The negotiation of the sale of the mortgage was conducted entirely by Augustus, and Eugene did not appear in the transaction.

On the nineteenth of March, 1874, a petition in bankruptcy was filed against Eugene Cammeyer in New York, on which an adjudication was had, and the plaintiff appointed assignee on the twenty-ninth of April following. Lambert had no knowledge or notice of the proceedings in bankruptcy against Eugene when he took the assignment of the mortgage from Augustus Cammeyer, two days afterwards. On the first of May, Mrs. Fish conveyed the property to the assignee by bargain and sale deed. Afterwards the plaintiff commenced this suit, asking that the conveyance to Mrs. Fish be declared void, as made in fraud of creditors, and that the mortgage and assignment of it to Lambert be

declared invalid for the same reason. The defendant Lambert alone answered, claiming protection as a *bona fide* purchaser. Augustus Cammeyer and the attorney of Mr. Lambert, his son, who chiefly conducted the negotiations, both died before any testimony was taken. Pending this suit the property was sold by the plaintiff, and sufficient of the proceeds to cover the mortgage in question was paid into court to abide the event of the suit. No question of usury was raised by the pleadings or at the trial.

W. B. Putney, for complainant.

J. T. Marean, for defendant Lambert.

BROWN, D. J. On the facts in this case it is not entirely clear that the mortgage of \$1,000 executed by Mrs. Fish to Augustus Cammeyer for the use of Eugene, a month after the latter's deed to her for his own use, should not be held as valid a charge upon the land, as against her, as if it had been a consideration mortgage given at the time the deed was made, being executed in pursuance of the understanding that she took the title for Eugene's benefit, and Augustus being a mortgagee upon a secret trust for Eugene. Apart from this consideration, however, the bond and mortgage had no legal force or effect until they were negotiated to Lambert upon the twenty-first day of March, 1874. In the hands of Augustus Cammeyer they would not represent any existing debt or obligation, or constitute any lien upon the property. But it is proved that they were executed by Mrs. Fish to Augustus for the purpose of being sold to raise money upon them. They were sold in precisely the manner intended, and the money procured thereby was also applied to the use of Eugene, as it was intended by Mrs. Fish that it should be applied. The assignment to Lambert, the purchaser, was, therefore, by the authority of Mrs. Fish; it was an act by which she intended the land should stand charged with the amount of the mortgage; and the execution of the bond and mortgage by her, and the assignment of them to Lambert, are, in legal effect, but different parts of one transaction, whereby the land was intended to be held for the amount of the bond. Until the assignment it was inchoate and incomplete. When thus negotiated to a *bona fide* purchaser it became as against Mrs. Fish, aside from any usury law, a binding obligation to the extent of the money advanced upon it, and must therefore have the same force against the assignee in bankruptcy as a bond and mortgage for that amount would have had if executed directly by Mrs. Fish to Lambert on the day the assignment to him was executed, viz., on March 21st, two days after the commencement of proceedings in bankruptcy.

The fraudulent purpose of Eugene Cammeyer and Mrs. Fish would not affect a *bona fide* purchaser. *Carpenter v. Muren*, 42 Barb. 300; *Barney v. Griffen*, 4 Sandf. Ch. 552.

No question of usury being presented by the pleadings, nor any law of the state regulating the rate of interest being pleaded or proved, no question on that point can be here considered. *Newell v. Nixon*, 4 Wall. 572, 583; *Morford v. Davis*, 28 N. Y. 481.

The cases cited by the complainant, to the effect that the assignee of a mortgage takes it subject to the same defences and equities which existed against the assignor, (*Schafer v. Reilly*, 50 N. Y. 61, and cases cited,) have no application where the sale and assignment are by the authority of the mortgagor, and are a part of the mode intentionally adopted for creating a charge on the land. In such cases the mortgagee is, in effect, the agent of the mortgagor, acting under a power to create, through an assignment to a purchaser, a legal encumbrance upon the property, and when this power is executed according to the intention the mortgagor becomes bound by the debt thus created.

The deed from Eugene Cammeyer to Mrs. Fish, dated January 29, and recorded March 6, 1874, was sufficient, *inter partes*, to pass the title to her. Her assent is sufficiently proved, and recording the deed was a good constructive delivery to her. But it was manifestly void as against creditors, and as against the assignee in bankruptcy. Section 5046 of the United States Revised Statutes declares that property thus conveyed in fraud of creditors shall * * * "immediately upon his appointment be vested in the assignee," and his title when appointed, it has been held, relates back to the commencement of proceedings in bankruptcy. Upon this ground it is urged on behalf of the complainant that his title is two days prior and therefore paramount to that of Lambert, and that therefore the mortgage never became any lien upon the property.

The general rule, however, is that where a title has been transferred by acts which are fraudulent, and therefore void, as against creditors or others, third persons who deal with the fraudulent grantee in good faith, without notice of the fraud, and before any legal proceedings have been taken, as by execution levied or by bill filed to avoid the fraudulent transfer, will be protected to the extent of their advances in any title or lien so acquired in good faith, and without notice of the fraud, (*Fletcher v. Peck*, 6 Cranch. 133, per *Marshall, C. J.*; *Jackson v. Henry*, 10 Johns. 185, 197; *Jackson v. Walsh*, 14 Johns.

407, 415; and see *Decker v. Boice*, 83 N. Y. 215;) and the same point has been ruled in regard to a *bona fide* grantee's title as against an assignee in bankruptcy under section 5046. *Beall v. Harrell*, 7 N. B. R. 400, per *Bradley, J.* I think the same effect must be given to a mortgage when taken by a *bona fide* purchaser, as to a deed to a *bona fide* grantee. Such statutes concerning the effect of fraudulent transfers are construed according to their design, to prevent frauds and provide remedies against them; but not to create new frauds by applying the statutes against persons who deal in good faith upon the strength of apparent titles. Until levy or bill filed, or some notice of the fraudulent character of the previous transfers, *bona fide* encumbrancers are, therefore, protected, and the remedies of creditors, or those representing them, are transferred to the proceeds, which stand in the place of the property sold or encumbered by the fraudulent grantee.

I do not perceive in the evidence any reason to doubt that Lambert bought this bond and mortgage in good faith. It was offered for sale at a discount, like numerous others at the same time. It was a second mortgage preceding a prior mortgage of \$4,000. There was nothing unusual in the circumstances. Lambert went to look at the property, and was satisfied of its value. His son, a lawyer, examined the title, and reported the title satisfactory, and thereupon he paid \$850 on March 21st, of which \$114.50 was used in paying the taxes on the property for the year 1873, and the balance, \$735.50, was given to the assignor. All this was in the usual and customary course of such transactions. Lambert is legally chargeable with knowledge, through his attorney, that the deed to Mrs. Fish, two months before, was for \$10, and natural love and affection. But he did not know Eugene Cammeyer, nor anything about his business or circumstances, nor whether he was in business or had any creditors; and nothing naturally suggested any inquiry on that subject. The open gift to his mother of the house in which she lived, as shown upon the face of the deed, would not naturally suggest the idea of any intended fraud upon creditors. Such frauds are usually accompanied by some concealment. Searches against the property and against Mrs. Fish disclosed no claims against either by any one, and nothing indicated that Eugene Cammeyer had anything to do with the mortgage offered for sale by Augustus. It was not apparently given as a consideration of the conveyance; nor was it executed to Eugene, but to Augustus; and it does not seem to me that the circumstances would

naturally suggest any inquiry or thought or search concerning the pecuniary condition of Eugene, who did not appear to have any connection with the bond and mortgage,²⁰ or with the property since the gift of it to his mother.

As all the proceeds of the mortgage went, in fact, into the hands of Eugene Cammeyer, the bankrupt, except the portion paid for taxes, the plaintiff is entitled to have those moneys accounted for by the bankrupt in the bankruptcy proceedings. But Lambert, as respects his mortgage lien, is entitled to the protection of a *bona fide* encumbrancer without notice to the extent of \$850, the sum actually advanced by him; and that amount, with interest, should be paid him out of the proceeds of the property, with costs; and judgment may be entered accordingly.

BARBER v. HALLETT.

(Circuit Court, D. Massachusetts. April 14, 1879.)

1. LETTERS PATENT—CUTTING ATTACHMENTS FOR SEWING-MACHINES—INFRINGEMENT.

The first, second, and eighth claims of reissued letters patent No. 7,860, for an improvement in cutting attachments for sewing-machines, the distinguishing feature of which is the cutting against the edge of the stock in a line parallel with the line of feed, are infringed by the defendant's machine.

In Equity.

Wright & Brown, for complainant.

Chas. H. Drew, for defendant.

LOWELL, C. J. The complainant is the patentee in reissue No. 7,860, for an improvement in cutting attachments for sewing-machines. The plaintiff, in his specification, declares his invention to consist of a reciprocating knife adapted to trim the edges of leather or other stock while it is being stitched, and in a line that is parallel with the stitching; that before this invention the knife had been reciprocated crosswise or against the side of the stock as the latter is supported on the machine, the knife rising and falling and cutting the stock during the downward movement. The mechanism by which this cutting or trimming is performed is described with much fullness, and a machine such as the complainant makes and sells is exhibited.

The defendant has a patent of a later date than the plaintiff's original patent, and produces one of his machines; and the question is whether the cutting or trimming device made under the defendant's patent infringes the plaintiff's monopoly.

It is not contended that the reissue is void. The mechanism described agrees entirely with that in the first patent, and though the claims are more numerous, there is a claim in the original which seems to be broad enough for all the purposes of this case. The reissue brings out more fully what the complainant now insists upon as the distinguishing features of his invention,—that is, cutting against the edge of the stock in a line parallel with the line of feed,—and the question is whether he is right in this contention.

The defendant has produced several patents which antedate the plaintiff's, the earliest of which seems of a very broad and general character, and perhaps would have controlled both of the machines in this case if it had not expired. It may be, however, that the plaintiff has a patentable improvement on all that had gone before, and if so, and if the defendant uses substantially similar means to produce a like result, he infringes. I think the plaintiff has made out that his machine does differ in the way that he says it does from the earlier machines, which employ a reciprocating knife. They appear to be organized to cut by up and down movements of various sorts, or by a drawing movement, or by a rotary sawing movement. The evidence further proves that there is utility in the change which the plaintiff has made. The defendant appears to me to make use of a device similar in operation to produce a similar result. His knife is pivoted to an independent carrier or arm above the plate, instead of being attached to the plate, and it works up and down to a certain degree; but being pivoted at an angle to the bed-plate the blow of the needle-bar which brings it down forces it forward against the edge of the stock, and most of the cutting is done during that part of the motion. In so far as it has a slight drawing motion, it may or may not be an improvement. The knife reciprocates, not, indeed, by the machinery alone, for the feed pushes it back after it has completed its cut, but it moves backward and forward automatically, which is all that reciprocating means.

It was argued that the plaintiff's cutter does not trim the work in a line parallel with the feed when straight work is being stitched, because the knife moves in the arc of a circle. The evidence, however, is,

that for all practical purposes the series of small arcs has the appearance of a straight line, at least when the sewing is fine, and is equally acceptable to the trade. Besides, the patentee describes fully in his specification a knife and its attachments in which the line of cut is absolutely straight. In short, the differences between the two machines appear to be merely changes in the position of the working parts, so far as the plaintiff's patent is concerned, though by these changes some improvement may, perhaps, have been accomplished.

I decide, therefore, that the defendant has infringed the first, second, and eighth claims of the reissued patent No. 7,860.

Decree for the complainant.

STOCKTON v. MADDOCK.

(Circuit Court, D. New Jersey. September 22, 1881.)

L. LETTERS PATENT—WATER-CLOSET—INFRINGEMENT.

The first claim of letters patent No. 155,814, for an improvement in water-closets, construed not to necessarily include the tube, *m*, as one of the elements of the combination described in it, and *held*, that the combination is patentable and infringed by the defendant.

In Equity.

James Buchanan, for complainant.

Edwin H. Brown, for defendant.

NIXON, D. J. This suit is for an alleged infringement of the first claim of certain letters patent, No. 155,814, granted to the complainant October 13, 1874, for "improvement in water-closets." Four defences are set up in the answer: *First*, that the complainant was not the original and first inventor of the invention claimed in the letters patent; *second*, prior use of the alleged invention; *third*, want of utility; and, *fourth*, non-infringement. The first claim of the patent, which the defendant is charged with infringing, is as follows:

"(1) In combination with the main-bowl, A, tangential receiving nozzle, B, and connecting opening, *a*, the spreader and showeret, C, formed in one with the bowl, and adapted to confine the water and project it circularly from the aperture, M, as and for the purposes herein specified."

Both parties concede that the claim is for a combination; the expert of the complainant insisting that the combination has four mem-

bers or constituents only, and the expert of the defendant testifying that it has five. This difference arises from the construction which they respectively give to the mechanism or device that fits into the interior of the bowl, adapted to receive and discharge the water from the aperture, and which the patentee calls, in the claim, "the spreader and showeret, C."

The complainant says that the terms "spreader and showeret" refer to one and the same thing; and he does not regard the function of projecting the water radially inward through the hole, *m*, as essential or belonging to the first claim, but only to the second. The defendant, on the other hand, insists that the showeret is the hole, *m*, and is the fifth and indispensable element in the combination; that the inventor nowhere suggests a combination which does not involve the use of the showeret, and that there is no infringement because the showeret was not present in the water-closet bowls manufactured and sold by the defendants.

The question is thus presented whether a proper construction of the first claim necessarily includes the tube, *m*, as one of the elements of the combination therein described.

The determination of such a question is not without difficulty. There is much force in the suggestion of the learned counsel for the defendant that the specifications and drawings of the patent nowhere disclose a hint that the invention was intended to be used without the presence of the showeret hole. But it does not follow from this that the showeret hole was an element in the combination which makes up the first claim. The chief object of the inventor, doubtless, was to produce a more perfect wash of a water-closet basin under a light pressure of water. He may have regarded the wetting down of the paper, by jetting a small stream into the space near the center of the bowl, a valuable auxiliary means to accomplish the result; and, if so, why should he not be permitted to put into a second claim the mechanism which produces these auxiliary means, provided the first claim is patentable without its introduction there? I am inclined to believe that the patent will bear this construction, although I should have been much better satisfied if more care had been taken to make manifest such intention. It is the lack of clearness in this respect that has given rise to the present controversy.

In his specifications the patentee claims to have invented certain improvements relating to water-closet basins. Taking the circular French basin, in common use, he says:

"To avoid the labor of excavating the usual groove part way around the under rim, and to avoid the weakening of the structure thereby occasioned, I hold the water up and cause it to whirl around with proper force by a different construction. I *also* provide means for getting one or more small streams into the space near the center of the bowl, for the purpose of more rapidly wetting down the paper or other material there."

I think there is much force in the word "also," above quoted, as indicating that the inventor had on his mind, not only the combination of the first claim, which in itself produced the more perfect wash, but also an additional contrivance that could be embodied in a second claim as auxiliary and helpful, although not necessary, to the efficiency of the first.

Thus construing the patent, the inquiry at once presents itself, in view of the prior state of the art, is such a combination novel or patentable? Its constituents are old, and the combination does not involve the exercise of much invention. But the fact that the defendant incurs the hazard and expense of a patent suit rather than give up using it, shows that, in his judgment, it is an improvement upon any one of the other basins now in use.

It is always difficult to determine what degree of improvement takes a case out of the mere exercise of mechanical judgment and puts it in the domain of invention or discovery. The general rule upon the subject is that any change in the position of old elements, whereby new and better results are accomplished, is a sufficient exercise of the inventive faculty to warrant the issuing of letters patent. *Bouscay, Jr's., Appeal*, 9 O. G. 743.

After some doubt I think the evidence in this case warrants me in holding that the patentee has succeeded in so combining the old elements that he gets a better wash to a water-closet basin, with a moderate supply of water, than could be obtained by the use of the circular French basin, the oval Jennings basin, or any other basin known to the trade at the date of his patent, and that he is entitled to the protection of the court in the exclusive use of the combination set forth in the first claim.

As the defendant has clearly infringed the same, under the foregoing construction, there must be a decree for the complainant, and a reference and an account.

THE LORD CLIVE.*

*(District Court, E. D. Pennsylvania. January 4, 1882.)***1. PILOTAGE—STATUTES OF PENNSYLVANIA—DUTY TO ACCEPT THE FIRST PILOT WHO OFFERS.**

Under the Pennsylvania statute of March 29, 1803, the master of a vessel, of the draught mentioned in the act, is bound to accept the first duly-qualified pilot who offers his services, and this provision of the statute is not repealed by the subsequent statute of March 24, 1851.

Libel by the Society for Distressed and Decayed Pilots against the steamship Lord Clive, to recover an amount equal to full pilotage of the vessel as a penalty for the refusal of the steamship to accept the services of a pilot. The penalty was claimed under the act of assembly of Pennsylvania of March 29, 1803, (4 Sm. Laws, 74,) which provides as follows:

“The pilot who shall first offer himself to any inward-bound ship or vessel shall be entitled to take charge thereof, provided his license shall authorize him to pilot ships or vessels of such draught of water; and it shall be the duty of such pilot, if required, to exhibit his license to the master or commander of such ship or vessel, and in case the draught of water of such ship or vessel shall be greater than such pilot shall be licensed to carry, he may, nevertheless, with the consent of the master, take charge of such ship or vessel until a pilot duly qualified shall offer; and if such qualified pilot shall offer before such ship or vessel shall have passed Reedy island he shall be received, and the former pilot entitled to pilotage according to the distance he may have conducted such ship or vessel, and the latter to the residue of the pilotage, which shall be ascertained by the master-warden for the time being; and the master or commander of such ship or vessel shall display the signal for a pilot heretofore used, until a pilot duly qualified shall offer; and if the said master or commander shall neglect or refuse so to do, or shall refuse or neglect to receive a pilot duly qualified, the master, owner, or consignee of such ship or vessel shall forfeit and pay to the warden aforesaid a sum equal to the half pilotage of such ship or vessel, to the use of the Society for the Relief of Distressed and Decayed Pilots, their widows and children, to be recovered as pilotage in the manner hereinafter directed.”

By the act of March 24, 1851, (P. L. 229,) it was further provided: “Every vessel arriving from or bound to any foreign port or place * * * shall be obliged to take a pilot. * * * And if the master of any such vessel, being licensed as a coasting vessel, and of the burden of 100 tons or more, shall refuse or neglect to take a pilot, the master or owner or consignee of

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

such vessel shall forfeit and pay the sum equal to half pilotage of such vessel; and if such vessel be not licensed as aforesaid, then and in such case the master, owner, or consignee thereof shall forfeit and pay the full pilotage thereof."

On June 20, 1881, the steam-ship Lord Clive, bound to Philadelphia on a voyage from Liverpool, was spoken by the pilot-boat E. C. Knight, and a duly-licensed pilot was sent on board. The master of the steam-ship refused to accept the services of this pilot, on the ground that he never before had acted as pilot to an ocean steamer. The master was then given another pilot out of the same boat, who piloted the steam-ship and received full compensation. This libel was then filed to recover the penalty of full pilotage for refusal to receive the first pilot who offered.

Albert E. Peterson and W. W. Willbank, for libellant.

H. G. Ward and Morton P. Henry, for respondent.

BUTLER, D. J. *First.* Does the act of 1803, (of Pennsylvania,) require vessels to accept the first duly-qualified pilot who offers his services, and inflict the penalty of half pilotage for refusal?

Second. What effect has the act of 1851 on the claim involved?

These are the only questions raised by counsel; and I will consider no other.

The twenty-first section of the act of 1803 authorizes the pilot who shall first offer himself, having the proper license, to take charge of the vessel. "The pilot who shall first offer himself to any inward-bound vessel shall be *entitled* to take charge thereof, provided his license shall authorize him to pilot a ship or vessel of such draught." The right thus conferred on the pilot necessarily imposes on the vessel a corresponding obligation to allow its exercise. The subsequent provision, inflicting a penalty for "refusal to accept a pilot," has reference to *this* pilot,—the first duly qualified, offering his services,—whether on the vessel's entrance of the bay, or at any subsequent time before passing "Reedy Island." The language "if the master or commander shall refuse * * * to receive a pilot duly qualified," clearly means if he shall refuse *the pilot whom the statute has authorized to perform the service*. Such refusal brings him not only within the spirit of the statute, but also within the letter. He has, (in such case,) "refused to receive a pilot duly qualified." That he may have taken another is unimportant; the fact remains that he has refused one, and the particular one on whom the right to perform the service is conferred by the statute.

The act of 1851 has no effect on the question under consideration, except to increase the penalty for such refusal. It contains no repealing clause, and its provisions are entirely consistent with so much of the statute of 1803 as imposes the obligation to accept the first duly-qualified pilot offering his services.

A decree must therefore be entered for the amount claimed.

THE MARY STEWART.

(*District Court, E. D. Virginia. December 27, 1881.*)

1. ADMIRALTY—TORTS ON LAND NOT COGNIZABLE IN—PERSONAL INJURIES.

An injury done to a man, while he is standing on a wharf, by a bale of cotton which is being hoisted aboard a ship loading at the wharf, but which falls before it reaches the ship's rail and strikes him, is not cognizable in the admiralty.

2. ADMIRALTY JURISDICTION CANNOT BE CONFERRED BY STATE STATUTES.

Nor can jurisdiction over such a tort be given by a state statute.

3. CHARTER-PARTY—ACTION DEFEATED FOR WANT OF PRIVILEGE.

Under the contract between the ship and the charterers the latter are to employ and pay for the stevedoring, and the ship is to furnish the tackle and falls by which the loading is to be done. Under this contract the ship furnishes a rope, which breaks after a short use of it by the stevedores, and one of the employees of the stevedore is injured by the falling of a cotton bale. *Held*, that there was no privilege between him and the ship, he not being a party to or interested in the contract of charter-party, nor any violation of any duty towards him, and that consequently he could not maintain an action against the ship or her owners.

In June, 1881, the ship *Mary Stewart* was chartered by Reynolds Bros., of Norfolk, to load with cotton. By the charter-party, Reynolds Bros. agreed to furnish and pay for the stevedoring, and the ship agreed to furnish the tackle necessary for loading. The officers of the ship had no control over the manner in which the stevedoring was carried on, but the ship was entirely under the control of the stevedores while loading. The ship furnished a three-inch rope. One end of this rope was fastened to an engine which stood on the wharf and furnished the hoisting power. The rope was then passed through a pulley attached to one of the masts of the ship, and the other end was fastened to the cotton which was being hoisted aboard. After the rope had been used a short time it broke near the engine, and one of the bales of cotton which was being hoisted fell and seri-

ously injured the libellant, W. A. Segar, who was one of the employes of the stevedore. He was standing at the time on that part of the wharf which is called the apron, and which projects out over the water, resting on piles driven into the water, and attached to that portion which is cribbed and filled in. He thereupon libelled the ship. The accident happened at the wharf of Reynolds Bros., in Norfolk.

Burroughs & Bro. and E. Spalding, for libellant.

Sharp & Hughes, for the ship.

HUGHES, D. J. It is clear that the cause of action set out in the libel is without the jurisdiction of the admiralty. In cases of tort the locality alone determines the admiralty jurisdiction. Only those torts are maritime which happen on navigable waters. If the injury complained of happened on land, it is not cognizable in the admiralty, even though it may have originated on the water. *The Plymouth*, 3 Wall. 20. This springs from the well-known principle, that there are two essential ingredients to a cause of action, viz., a wrong, and damage resulting from that wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage—the other necessary ingredient—must also happen on water.

Now, the injury in the case at bar happened on the land. Wharves and bridges are but improvements or extensions of the shore. They are fixed and immovable, and are a mere continuation and part of the real estate to which they are attached. And this is the case, whether they project over the water or not. Injuries done to or on them, therefore, are not cognizable in the admiralty. *The Rock Island Bridge*, 6 Wall. 213; *The Neil Cochran*, 1 Brown, Adm. 162; *The Ottawa*, Id. 356.

Not being cognizable in the admiralty, such injuries cannot be made so by the state statute. Such a statute cannot, of itself, confer jurisdiction on the admiralty courts. The various state statutes attempting this have no effect of themselves, but are operative only because, to a limited extent, they have been adopted by the twelfth rule in admiralty of the United States supreme court. And the only effect even of that rule is to annex the additional right of a proceeding *in rem* to a contract already maritime in nature. *The Pacific*, 9 FED. REP. 120.

As the libel must be dismissed for want of jurisdiction, I might well refrain from passing on the other questions discussed. But

inasmuch as the question of privity has been elaborately argued, I will pass upon that also.

The libellant was not employed by the ship, but by Mr. Donald, the stevedore. He was not a party to the contract between the ship and the charterer. It is well settled that where a party is delinquent in a duty imposed by contract, no one but a party to the contract can maintain an action. It is only where a party neglects a duty imposed by law, in other words, a duty to the public, that an action will lie on the part of any one injured thereby, irrespective of privity. That is, if the injury complained of arose from the neglect of a public duty, any one injured may maintain an action, and the mere fact that there is a contract between one of the parties and a third person will not defeat the action. Now it can hardly be argued that furnishing a proper rope is a duty imposed by law. It is a duty imposed by charter-party alone, a duty due to the charterer alone, and for violation of which he alone can sue. It was not a duty to the public. Had the masts of the ship, for instance, been insecurely fastened and fallen and injured any one, that would have been a violation of a public duty,—a duty imposed by law on every one to have no dangerous structures on his property, which may injure those who come on the premises by the invitation or permission of the owner. But a rope can hardly be called a dangerous structure. The injury in the case at bar arose not from the rope itself, but from its use. The proximate cause of the accident, therefore, was the use of the rope by the stevedores, not the furnishing of the rope by the ship.

The cases of *The Kate Cann*, 2 FED. REP. 241, and *Coughtry v. Woolen Co.* 56 N. Y. 124, quoted by counsel for libellant, do not militate against this view, but, on the contrary, sustain it. In the former the injury arose from the falling of some dunnage, which had been insecurely fastened. The neglect to fasten it properly and safely was clearly a violation of a duty imposed by law. So, too, in the latter case, where the injury arose from the falling of a scaffold on the defendant's premises. Ample authority for the doctrine laid down above may be found in the following cases: *Alton v. Ry. Co.* 19 C. B. (N. S.) 213; *Tollit v. Sherstone*, 5 M. & W. 288; *Winterbottom v. Wright*, 10 M. & W. 112; *Collis v. Selden*, L. R. 3 C. P. 496; *Playford v. Telegraph Co.* L. R. 4 Q. B. 705.

I will sign a decree dismissing the libel, with costs.

POSEY v. SCOVILLE and others.*

(Circuit Court, E. D. Louisiana. December 22, 1881.)

1. NEGLIGENCE—STEAM-BOAT—EXPLOSION OF BOILER.

The explosion of a boiler of a steam-boat, causing injuries, is *prima facie* evidence of negligence.

2. SAME—SAME—SAME.

Failure to have boiler tested, as a new boiler, after one sheet had been condemned as burnt and had been replaced by a new sheet, was negligence. Rev. St. § 4418.

3. SAME—CHARTER-PARTY—LIABILITY OF CHARTERERS.

The charterers being the owners of the vessel, *pro hac vice*, at the time of the explosion, were responsible for their negligence.

In Admiralty.

The Bonnie Lee was a passenger and freight steam-boat, making regular trips on the Mississippi and Red rivers, between New Orleans and Shreveport, Louisiana; was owned by Noah Scoville, and was being run, under charter, by the New Orleans & Red River Transportation Company. Jefferson B. Posey was the second clerk of the boat. On August 7, 1880, in accordance with the usual public advertisements, the Bonnie Lee left New Orleans, bound for Shreveport. Between 7 and 8 o'clock on the night of the ninth of August, 1880, when near Lenoir point, on Red river, about 85 miles from its mouth, the boiler exploded. Posey at the time was sitting on the boiler deck, and was, by the explosion and the falling timbers, so injured that he died a few hours after he was taken from the wreck, which sank, almost immediately, in 35 feet of water. His widow, in her own right and as tutrix of their minor child, brought this libel *in personam* against the owner, the charterers, and the master of the boat for damages. It appeared that the boiler was found to be burned, and one of the sheets was taken out and replaced by a new one on the day the boat left New Orleans, the seventh of August, 1881, but after this was done the boiler was not tested. It also appeared that on the night of the eighth of August the boiler was found to be leaking so badly that they were compelled to stop the boat and caulk the boiler. The defences are stated in the opinion of the court. There was a decree by the district court in favor of libellants for \$2,500, and the New Orleans & Red River Transportation Company appealed.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

Joseph P. Hornor and Francis W. Baker, for libellant.

W. S. Benedict and George Denegre, for defendants.

PARDEE, C. J. The evidence in the record leaves no doubt that the boiler of the Bonnie Lee exploded, causing the injuries to and the death of Jefferson B. Posey; nor can there be any doubt that the explosion was caused by a defective boiler. The theory of a snagging—

“Which tore a hole in the hold of the boat 12 or 15 feet aft of the forward hatch, on the port side, nearly under the forward mud-drum, and broke off the mud-drum leg, and tearing open the timbers of the hull, and causing the bow to be raised up suddenly very high and then to fall, causing the boat to be hogged amidships, and upsetting the boiler, by the effect and cause whereof said boiler exploded and the vessel sank,”

—Is improbable and wholly unsupported by the evidence. An explosion proved makes a *prima facie* case of negligence on the part of owners or officers. And such negligence is not repelled by the proof in this case.

I do not set much store by the fact appearing in the evidence that after the repairs made on the boiler in this city the boiler leaked and caused delay, and required caulking within 24 hours after leaving the city. But I do find that the failure to have the boiler tested, the same as a new boiler, after one sheet had been condemned as burnt and had been replaced by a new sheet, was negligence. Leaving out of the question the effect of putting new cloth into old garments, I am of the opinion that when new sheets are put into an old boiler reason requires the same test of that repaired boiler as would be required of a new boiler; and I take it that under such circumstances such new test is required by a fair construction of the laws of the United States in relation to the inspection of boilers for steamcraft. See section 4418, Rev. St.

The judgment of the court below was against the Red River Transportation Company, as the responsible parties under a charter-party, and that company is the appellant here, insisting that, although they were running the boat in the interests of their company, yet they were not such charterers as made them liable for negligence in running the boat, as they claim that Noah Scoville, the real owner, was appointing the officers of the boat.

The evidence shows a charter by Scoville to the New Orleans & Red River Transportation Company of date twenty-seventh of June, 1877, of the Bonnie Lee, for one year, containing the following clauses:

"The New Orleans & Red River Transportation Company shall have the privilege of appointing the captain, officers, and men of said steam-boat, and shall have full and absolute control of said steam-boat as to time when and how she shall be employed during the existence of this charter.

"At the expiration of this charter the said transportation company shall have the privilege of running it for one year, and of running it continuously at the expiration of each additional charter period, at its option."

The evidence shows that since the charter the transportation company has been running the boat on the terms in the charter, and that every year there has been an express or tacit renewal of the contract by the transportation company. On the very trip she was lost she was advertised, loaded, and sailed under the auspices and for account of the transportation company. That the owner, Scoville, actually appointed the officers is of no weight, as it was evidently done by the consent of the charterers. There can be no doubt that at the time of the injuries inflicted on Posey the transportation company were the owners *pro hac vice*, and are responsible for their negligence.

The decree of the district court will be affirmed by proper decree entered in this court

COPE and others v. VALLETTE DRY-DOCK.*

(District Court, E. D. Louisiana. January 3, 1882.)

1. ADMIRALTY AND MARITIME JURISDICTION.

This jurisdiction, so far as relates to subject-matter, means that jurisdiction which had been and was being exercised in admiralty in this country prior to and at the adoption of the constitution, and with reference to locality, comprises the navigable waters of the nation, as well as the high seas.

2. SAME—SALVAGE—DRY-DOCK.

A claim for the salvage of a dry-dock—a floating dock capable of elevation or depression in the water by means of pumping water in or out, designed and used to be sunk under vessels, and then pumped out so as to become dry, leaving the enclosed vessel in a position to be inspected and repaired, and incapable of self-propulsion, not capable of being used for any purpose of navigation, and permanently moored in the Mississippi river by means of enormous chains—is not within the admiralty and maritime jurisdiction of the courts of the United States.

Action in rem for salvage. The libel alleged that the Vallette dry-dock, lying in New Orleans, on the right bank of the Mississippi river,

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.
See same case on appeal, 16 Fed. Rep. 924.

was run into by a steam-ship that was about leaving port, and was considerably damaged and left in great danger of sinking. The steam-tugs of libellant and others came and rendered assistance by pumping, which saved the dry-dock, and they were therefore entitled to salvage.

Chas. S. Rice and J. R. Beckwith, for libellants and intervenors.

M. M. Cohen, for claimants.

BILLINGS, D. J. This case has been heard upon a plea to the jurisdiction. The question submitted is whether the thing libelled is of such a nature or character as to make it subject to a claim for salvage in the sense in which that word is used in admiralty.

The subject of this libel is a dry-dock—a floating dock susceptible of elevation or depression in the water by means of pumping the water out or in. Its design and use is to be sunk under a vessel and then to be pumped out so as to become dry, leaving the vessel in a position to be inspected and repaired. It is incapable of self-propulsion, cannot be propelled except when towed, has no capacity to be used for any purpose of navigation, and was permanently moored in the Mississippi river, by means of enormous chains, at a point opposite the city of New Orleans. The libel alleges the dock had been run into, was sinking, and was saved.

The question turns entirely upon the meaning of the expression "admiralty and maritime jurisdiction" in the provision of the constitution of the United States (article 2, § 3) which creates the judicial power, and in the ninth section of the judiciary act of 1789, which delegates that power to the district courts.

It has been laid down by Chancellor Kent and Justice Story, and is affirmed by the supreme court in *Ins. Co. v. Dunham*, 11 Wall. 1, and *Ex parte Easton*, 95 U. S. 68, that this jurisdiction means that jurisdiction which had been and was being exercised in admiralty in this country prior to and at the time of the adoption of the constitution, and not the jurisdiction of England nor that of continental Europe. So far as extent of locality is concerned, in the courts of the United States, it comprises the navigable waters of the nation, as well as the high seas.

As to what was included within this jurisdiction, my own opinion is that we can most safely look to the commissions of the judges in admiralty before and at the time of the revolution. A number of these commissions are given *in extenso* in Ben. Adm. c. 9. These commissions show what contracts are included in that jurisdiction,

namely, charter-parties, bills of lading, policies of insurance, etc.; they show that locally it included the sea, public streams, etc.; what torts were included within it; and, lastly, what can be the subject-matter of salvage; for, besides everything pertaining directly to a ship, or things used in navigation, they add, "and also of and concerning all casualties at sea, goods wrecked, flotsam, jetsam, lagon, shares, things cast overboard, and wreck of the sea, and all things taken or to be taken as derelict or by chance found or to be found."

If one was most laboriously to prepare from all the admiralty cases which have been acquiesced in, an enumeration of the things which can be subjected to a claim for salvage, it could scarcely be more exact. It is to be seen that it includes the vessel or ship, wrecked goods, goods which float away or are cast away or which sink from the ship, and to this enumeration are added derelict things, and things found, *i. e.*, abandoned.

The reason of this precise discrimination is that with the exception of derelict and things found, and the ship, her cargo, and freight, there could be no basis in reason for a lien which must exist in order to support a libel *in rem*. The ship and all things which pertain to it, are, in the law of admiralty, clothed with personalty, so far as responsibility goes. Those who repair or loan upon her, or equip or man her, and those who deal with her, and those who are injured by her, and those who save her, look to her. The reason of this is that she was often far distant from her home and owners, and commerce was vastly facilitated by the law thus endowing her with the attributes of a person. This is the origin of the doctrine of liens in the maritime law, and by this it is to be measured—so measured, in cases of salvage, it included the ship's apparel, tackle, money, freight, cargo; and here it stopped, for the necessities of commerce did not require that anything else should be clothed with, so to speak, capacity to subject itself to pecuniary responsibility. The salvage allowed derelict and "found" property, from a different reason, namely, as an incentive to save property abandoned to destruction from the elements upon the broad ocean.

I think the commissions of the colonial admiralty judges, a study of the cases which have arisen in our admiralty jurisprudence, and the fact that salvage is allowed only in connection with commerce, all lead to the recognition of this test as being the true one. Judged by it, the object here libelled, the dry-dock, is not the subject of admiralty or maritime jurisdiction for salvage.

This manner of arriving at a solution of the question before the court renders it unnecessary to comment upon the cases which have been cited, further than to say that in all the cases decided by courts of the United States where salvage has been allowed, the property saved was either the ship, her cargo and freight, or derelict property, or property abandoned upon the navigable waters, and in all the cases where it has been disallowed the property saved was neither. I except the case of *Four Cribs of Spars*, Taney, 533, where the usages of the lumber business seem to have controlled the court.

See *The Hendrick Hudson*, 3 Ben. 419; *Salvor Wrecking Co. v. Sectional Dry-dock Co.* 3 Cent. Law J. 640; *Thackeray v. The Farmer*, Gilpin, 524; *The Belfast*, 7 Wall. 637; 1 Conkling, Adm. 8; *50,000 Feet of Lumber*, 2 Low. 64; *A Raft of Spars*, 1 Abb. Adm. 485; *23 Bales of Cotton*, 9 Ben. 48.

The plea to the jurisdiction is maintained, and the libel dismissed.

WATTS v. J. B. CAMORS & Co.*

(Circuit Court, E. D. Louisiana. June, 1881.)

1. CHARTER-PARTY—REPRESENTATIONS IN.

The representation of the registered measurement of a vessel in a charter-party is to be taken as merely descriptive, when the evidence shows that it was known to neither of the parties at the time the contract was entered into, and neither party was entrapped or misled thereby, and when the contract, taken as a whole, shows that the real consideration actuating the charterers was the actual carrying capacity of the vessel.

2. SAME—CONSTRUCTION OF.

The court will not, at the instance of a party, construe a contract so that it would be necessarily void at the option of said party, if it does not appear that both parties intended it should be so construed.

3. SAME—MEASURE OF DAMAGES FOR THE VIOLATION OF.

The amount of damages to be awarded for the violation of a charter-party must be estimated by the rules of the commercial and admiralty law, and be the actual damages suffered, and not the amount of the stipulated penalty, although that might be the measure of damages under the law of the place where the charter-party was made.

In Admiralty.

J. R. Beckwith, for libellant.

Henry C. Miller and *J. Ward Gurley, Jr.*, for defendants.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

PARDEE, C. J. This cause, tried and submitted at the last term, grows out of a charter-party entered into between the parties at the city of New Orleans on the eleventh day of August, 1879. The charter-party is in nearly the usual form, and only three quotations from it are necessary to present the case as it stands before the court:

(1.) "This charter-party, etc., between A. B. French & Co., agents for the owners of steam-ship Highbury, of the burden of 1,100 tons, or thereabouts, register measurements, due here between the tenth and twentieth of September, of the first part," etc. (2.) "The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo, say about 11,500 quarters of wheat in bulk, and pay," etc. (3.) "To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, and also the said vessel's freight, tackle, and appurtenances, and the merchandise to be laden on board, each to the other in the penal sum of estimated amount of freight."

The evidence taken in the case shows that the Highbury arrived on time, say September 9th, and on the 11th of September reported to the defendants as ready to comply with the terms of the charter-party. The defendants replied by letter on the 12th of September as follows:

NEW ORLEANS, September 12, 1879.

Jacob Garson, Master S. S. Highbury—DEAR SIR: We have received your notification stating that the S. S. Highbury, under your command, is ready for cargo, and have transmitted said notification to Messrs. Gordon & Gomilla, to whom we had sold the charter of said vessel. These gentlemen return for answer that they decline to accept said vessel under said charter, on the ground that the actual tonnage is greater than expressed in the charter. They further call upon us to deliver a steamer of the size mentioned, and we also call upon you to do the same.

Yours, truly,

[Signed]

J. B. CAMORS & Co.

On the twentieth of September defendants wrote to the master of the Highbury declaring themselves released from the obligations of the charter-party, and calling for a similar steamer. The Highbury waited the necessary time, and September 30th the master of the Highbury made public protest, which was served on the defendants, and thereafter the Highbury took on a cargo of cotton and oil cake, and sailed for Liverpool. The actual tonnage of the Highbury was 1,203 tons, and the ship could carry about 11,500 quarters of wheat. A ship of 1,100 tons cannot carry over 9,500 to 10,000 quarters of wheat. It appears that in dealing with cargoes of wheat in bulk usage allows a margin of 10 per cent. either way, but no more. The libellants demand judgment for the full amount of the estimated

freight, the penalty for default stipulated in the charter-party. The defendants claim that the representation in the charter-party of the register measurement of the Highbury was a substantive part of the contract, amounting to a warranty, and as the Highbury's actual tonnage largely exceeded the representation by over 100 tons, the defendants had a right to reject the ship and disregard the charter. And the defendants further claim that as they rejected the ship at once, it was the duty of the master and owners to at once have taken in other cargo, lessening any damages that might follow from the avoidance of the charter-party; and that, in fact, thereafter the ship did receive a more valuable freight, and therefore was not damaged at all by the conduct of the defendants.

The first question to decide is as to the effect of the misdescription of the register measurement of the Highbury. There is much evidence bearing on the customs and usages prevailing among shippers of wheat as to the size of cargoes, and what will avoid contracts for grain in bulk. And in this case there is evidence tending to show that charterers had no wheat to ship, and that freights were lower in September, 1879, than in August, and also tending to show that defendants were informed before the charter-party was made of the actual carrying capacity of the Highbury; but all of this is immaterial in the view I take of the contract. The contract, taken as a whole, can be made effective only by considering the representation of the register measurement as descriptive merely; in fact, the evidence shows that it was known to neither of the parties at the time the charter-party was entered into. The real consideration of the contract was, in the course of things, the carrying capacity of the ship, and this is shown by the agreement on the part of defendants to furnish a cargo of, say, about 11,500 quarters of wheat. As the defendants ask the court to construe the agreement, it would be necessarily void at the option of the defendants. If a ship of 1,100 tons carrying capacity had been tendered they could reject it, as it would not carry about 11,500 quarters of wheat, the stipulated amount of cargo. If a ship were tendered able to carry a cargo of 11,500 quarters, then they might reject it, as they have in this case, because the tonnage was over 1,100 tons, register measurements. In other words, the charter-party was binding on the owners, but the charterers might use their pleasure. The court can not give any such construction, as the terms of the charter-party do not warrant it.

The description in the charter-party of the register measurements of the Highbury was a mere representation, and not a warranty; and

as it was not fraudulent, and did not entrap or mislead the defendants, will not vitiate the contract, although the actual measurements exceeded the representation by some 100 tons. See *Ashburner v. Balchen*, 3 Selden, 262; *Barker v. Windle*, 6 Ellis & Black, 675; *Thomas v. Clarke*, 2 Starkie, 450.

The authorities cited by defendants' proctor all cover cases where the misrepresentations affected the time of receiving or delivering the cargo, or of the sailing or arrival of the vessel, which may well enter into the object and consideration of the contract. To my mind it is clear that the defendants were in default for not complying with their contract, and are liable for the damages resulting. What is the rule of damages is to me a very serious question.

The libellants claim that, as the contract was entered into in Louisiana, the law of Louisiana forms part of the contract, and under that law (Civil Code, arts. 2117-2129) the full amount of the stipulated penalty, the estimated amount of freight, is claimed. The defendants claim that the charter-party is an admiralty contract, to be enforced and construed by the settled principles of admiralty law; wherever the contract is made, that it is usually made on land, must be made somewhere, but wherever made, does not change or affect the principles of admiralty law which a court of admiralty enforces. And they claim, under the admiralty and commercial law, that the stipulated penalty in this case in the charter-party should not be treated as liquidated damages, but as a mere covenant to pay actual damages.

The learned proctors on each side have made strong arguments, well supported by authorities,—that for the libellant being particularly logical and forcible, and almost compelling conviction, but for the harsh results following its application. And it might be here noticed that under the Louisiana law, as claimed, it is only where there is a total breach that the total amount of the penalty can be exacted. See Rev. Civil Code, art. 2127.

The rule of damages as claimed by the defendants is the more equitable. It is the rule that prevails in the commercial world, and is the one recognized in all the text-books. See 1 Parsons, Adm. Law. 247, 248; Story, Cont. § 1022; Sedgw. Dam. 436, § 301; Conkling, Adm. *verbo* "Affreightments;" Abbott, Ship. 285.

The harsh rule claimed by libellant may be, and I am inclined to think is, the law of Louisiana, (Rev. Civil Code, arts. 2117 *et seq.*) and in her courts, or on the law side of this circuit court, I might, in proper cases, enforce it; but sitting in admiralty, enforcing admi-

ralty law, I feel bound to lean to the equitable rule as against the harsh one claimed. And I am inclined to the opinion that it is the duty of the United States courts, in exercising admiralty and maritime jurisdiction, under the constitution to follow the general principles of the admiralty and maritime law, as they are recognized and prevail in the commercial world, rather than a narrow local law which may happen to prevail where a charter-party happens to be made, and which law was evidently not in the minds of the contracting parties. And there is authority for this position. See *U. S. v. Bank*, 1 Pet. 104; *The Bark Chusan*, 2 Story, 456.

The reasoning in *Neves v. Scott*, 13 How. 268, would seem to apply to the admiralty and maritime law, as well as to the equity jurisdiction and law controlling the courts of the United States.

On the whole, I am disposed to hold in this case that the penalty stipulated in the charter-party cannot be considered as liquidated damages between the parties, but that the libellants can recover only the actual damages suffered by the default of the charterers. These actual damages are for (1) the expenses incurred in fitting the *Highbury* to receive a cargo of grain; (2) the delay, after the expiration of the lay days stipulated in the charter-party, in obtaining and loading another cargo, to be allowed at the rate fixed in the contract; (3) the loss, if any, of freight on the cargo obtained, as against that contracted to be furnished by the defendants.

The defendants claim that it was the duty of the master and agents of the *Highbury* to have immediately sought another cargo on the first refusal of the defendants to accept the ship, and not have waited until the lay days had expired. Perhaps in some cases this might be so, but in this case I doubt if the master of the *Highbury* had a right to consider the first letter as a final refusal. The evidence of French, agent, is that he applied to Camors, defendant, for leave to load other cargo, and that Camors refused, and there was talk of arrangement and compromise, and even as late as September 29th letters in relation thereto passed between the parties; and each side during the lay days was threatening the other with claims for violation of the contract. So, I think, the master and agent of the *Highbury* had a right, and it was their duty, to wait such time as was necessary to put the defendants clearly in default.

A reference is necessary to ascertain the damages recoverable by the libellants before a final decree can be entered.

THE BLUE BONNET.

(District Court, S. D. New York. January 9, 1882.)

1. COLLISION—DUTY OF STEAMER ON APPROACHING TUG AND TOW.

Where a steamer is approaching a tug and tow in a dangerous part of a narrow stream both are bound to exercise special vigilance and caution. The steamer has no right to proceed unnecessarily, so as to be set possibly by the tide upon the tow's side of the stream, but should stop betimes, if need be, to allow the tow to pass.

2. SAME—TUG AND TOW—DUTY OF—DANGER SIGNALS.

A tug and tow being in a bend of a narrow stream, and upon the side towards which the tide directly sets, should not occupy unnecessarily the full half of the stream. If they do so, the tug is bound to give danger signals upon the first indication of possible collision, and to change her course betimes and give way as much as possible, and stop if necessary.

3. SAME—RIVER NAVIGATION—BOTH IN FAULT.

Where the steam-tug B. B. was coming down the Raritan river against a flood tide with a tow of 14 loaded canal-boats, in all about 95 feet wide by 300 feet long, attached to the tug by hawsers 40 fathoms in length; and was in a bend of the river from 350 to 400 feet wide on the side towards which the flood tide was setting from a straight reach below the bend, and the steamer A. was coming up the river with the tide, each having proper lights and duly signalled by the other when half a mile apart to keep to the right, and where each kept on in full view of the other's lights, and both ported at about the same time, but too late to avoid a blow from the tug upon the port quarter of the steamer, whereby the course of the latter was so changed as to carry her with the tide against the tow, whereby one of the canal-boats was sunk: *Held*,—upon contradictory testimony as to the place of the collision in the stream, each vessel claiming that she was hugging her own side of the river,—that the tow fully covered her own half of the stream, and that both the tug and steamer were in fault.

In Admiralty.

Benedict, Taft & Benedict, for libellants.

Beebe, Wilcox & Hobbs, for the Blue Bonnet.

Owen & Gray, for the steamer Annie.

BROWN, D. J. This libel is filed by the owners of the canal-boat Cato to recover damages for the loss of the boat and cargo through a collision on the Raritan river in the evening of April 7, 1879.

The Cato formed one of 14 boats in tow of the steam-tug Blue Bonnet, bound from New Brunswick to New York, and attached by a port and starboard hawser about 40 fathoms long, running to each side of the tow. There were three tiers of boats—five in the two forward tiers, and four in the after tier. The Cato was in the head tier, and was the second boat from the port side. They left New Brunswick at about 6 P. M. and reached the place known as the Brick-

Kilns, about seven miles distant, from 8 to half past 8 in the evening. The night was clear, with moonlight. As the Blue Bonnet was passing the Brick-Kilns the steam-propeller Annie, bound up the river from New York to New Brunswick, collided with the Blue Bonnet by the port quarter of the steamer coming in contact with the port bow of the tug. The blow was sufficient to send the stem of the steamer to port, and she went rubbing along the side of the tug, with her engines backing and her wheel to port, until after passing the tug her bows crossed the port hawser of the tow and struck the starboard bow of the Cato, inflicting damage from which the latter afterwards sank.

The place of the collision was in a cove or bend of the river, which, after running about half a mile in a course S. S. W., curves to E. S. E. for about a quarter of a mile, past Washington creek and the Brick-Kilns, and then bends to the N. E. for about half a mile past Sayresville. Towards the upper part of the bend of the river the creek or canal known as Washington canal runs from the river in a southwesterly course. This canal at its mouth is about 150 to 200 feet wide. At the lower side of the canal there is a bulk-head which extends down the river about 600 feet, and is known as the Brick-Kilns. At the time of the collision the tide was flood. This tide sets up the half-mile reach past Sayresville and across the river towards the Brick-Kilns and Washington canal, part of the tide passing up the canal and the rest rounding to the upper side of the bend. The Raritan around this bend varies from 350 to 400 feet wide.

The stern of the Annie, after her bows struck the Cato, was thrown through the combined action of the tide, her reversed engines, and the collision, nearly directly across the river and towards the southern shore, bringing her nearly broadside in front of the hawser tier of boats; and in that position, her engine being again reversed, she moved forward out into the northerly part of the stream, and so cleared the tow and went on her course up the river.

From this situation of the Annie, which is verified substantially by all the witnesses, it is manifest that she was at the time of the collision at least as far to the southward as the center of the stream; otherwise she could not possibly have cleared the tow in the manner that she did. She was 149 feet long, and as she lay in front of the hawser tier of boats her captain says that she was 30 or 40 feet from the southerly shore.

The usual lights were carried by both vessels. Those on each were

seen by the other from half a mile to a mile distant. When half a mile distant, one signal whistle was blown by the tug, which was answered by the propeller, signifying that each was to keep to the right. Both were accustomed to the navigation of the river, and were well acquainted with its peculiarities, the set of the tides, and the difficulties of tows in rounding the curves. The Annie was without any encumbrance, and there can be no sufficient excuse for her being found in the southerly half of the stream, where she knew there was a tow approaching. The witnesses on her part testify that the tide was such as to set her stern towards the southerly shore, while her bows pointed somewhat towards the northerly shore; and such, I think, all the evidence shows was her position at the time her port quarter struck the bows of the Blue Bonnet; and doubtless but for this blow, and her bows being thereby thrown to port, she would have passed clear of the tow, at that time some 300 feet distant.

On the part of the Annie it is claimed that when thus struck by the Blue Bonnet her stem was within 25 feet of the northerly shore, and that the collision with the Blue Bonnet arose from a quick sheer by the latter to port under a starboard helm. But the position of the tow and of the Annie in front of it, just after the collision, with her stern very near the southerly shore, and her mode of getting clear by going ahead directly across the river, all show that her position at the time of colliding with the Blue Bonnet is placed by her witnesses much nearer to the northerly shore than she could then have been. The evidence shows that she must have been fully out into the middle of the stream. The lights of the tug and tow were clearly seen; the set of the tide was known; and if she were not easily able to keep well within the northerly half of the stream, it was her duty to stop, which she might easily have done, and to allow the tug to pass her before she entered the bend of the river. Nor does there seem to be any reason why she did not port earlier than she did; and no attempt to stop her was made until after she had struck the Blue Bonnet. Without further discussion of the testimony it seems to me quite plain that the Annie was in fault.

Whether the Blue Bonnet was also in fault is a question of more difficulty. Most of the witnesses in her behalf testify that at the time she struck the Annie she was hugging the southerly shore at a distance from it of 10 to 30 feet only, and that the starboard boat of the tow was equally near the shore.

If this estimate of their distance from the shore were correct, a

collision between the Blue Bonnet and the Annie would have been in the highest degree improbable. Even making allowance for the set of the tide, it is almost incredible that the Annie, with the tug in full view and the stream at that point about 400 feet wide, could have got within 50 feet of the southerly shore. It is also very difficult to perceive how the Annie could, so near the southerly shore, have got into the position assigned her by all the witnesses,—that is, with her stern somewhat pointed toward that shore,—so as to be struck by the Blue Bonnet on her port quarter; further towards the middle of the stream that position would be easily taken upon porting. There was no possible reason for the Annie being so far on the southerly side of the river. Apparent distances upon the water in the night-time are specially deceptive. The Blue Bonnet, very shortly after the collision, did come near to the docks; and as there is other testimony which is more accordant with the probabilities, I might say with the necessary facts, of the case, I conclude that the witnesses who place the Blue Bonnet so near to the southerly shore at the time of the collision have not distinguished her position just after the collision from that at the time of and prior to the collision.

The captain of the Blue Bonnet came on deck just before the first collision, saw they would hit, and went aft, where he stood and watched what took place. He testifies that the tug and tow covered about 150 feet of the channel. The captain of the Annie, who was in the pilot-house, and in a situation to observe both the canal and the shore, testifies that as the Annie lay in front of the hawser tier of boats, after she had struck the Cato, her stern was 30 feet from the shore and at least 200 feet below the canal. As the Annie was 149 feet long, and her bows only extended as far as the Cato, and as there was another boat outside of the latter, this evidence would carry the port side of the tow very nearly 200 feet from the southerly shore; that is, rather more than half way across the river, which was not over 350 feet at that point. The width of the tow itself, which consisted of 5 canal-boats, was about 95 feet.

On the part of the Blue Bonnet it is urged, in answer to this mode of fixing the place of the tow in the river, that the stern of the Annie as she lay across the hawser pier ran up into the canal, and in support of that view the testimony of her witnesses is appealed to, showing that the head of the tow was not at that time below the canal. But I do not find that any of these witnesses were in a situation to observe with any degree of accuracy on this point. Capt. Hoagland,

though saying that the head of the tow was "about off the middle of the creek," adds: "Of course I was not back there to see; I could not tell 40 fathoms behind." The Annie, moreover, a larger boat, lay between him and the canal, and the captain of the Annie testifies that the steamer lay some 200 feet below the canal. None of the other witnesses on the part of the Blue Bonnet were in so good a place for observation as their captain, as they were all from 300 to 400 feet below the canal. After the collision, moreover, the tow floated with the tide up the canal, and the tow was about 300 feet long. Had the head of the tow only reached the middle of the canal at the time of the collision, so as to leave room for the stern of the Annie, as she lay across, to run up into the canal, three-fourths of the tow must have been above the canal, and consequently above the influence of the flood tide that ran into the canal, and within the influence of that part of the tide which ran up the river. To have been carried up into the canal by the tide the tow must have been mainly out of the reach of the river part of the tide; otherwise, under the combined effect of both branches of the tide, the tow must necessarily have grounded upon the upper corner of the canal and river, where the shore was shelving.

I find, therefore, that the head of the tow was below the canal, as the captain of the Annie states. Her stern, as she lay across the hawser tier, might have been nearer the southerly shore than 30 feet, but she did not touch it, and the port side of the tow, which had one boat beyond the Cato and the Annie's bows, must therefore have been not less than 180 feet from the shore, and her starboard side not less than 85 feet distant.

This view, based upon what seem to be the necessary facts of the case, agrees very nearly with the testimony of Captain Kelly, of the Cato, who stands as a disinterested witness. He estimated the tow to be from 100 to 150 feet distant from the southerly shore, and from 120 to 150 feet wide. His estimate of the width of the tow is too large, as it was not over 95 feet wide. The same proportionate correction, applied to his estimate of the distance from the shore, would give about 80 feet from the shore to the starboard side of the tow, or about 175 feet to the port side of it; and this does not greatly exceed the distance given by the captain of the Blue Bonnet, who estimated it at 150 feet.

The Blue Bonnet was about 250 feet ahead of the middle of the tow. In rounding the bend of the river she necessarily went under

a helm kept somewhat to starboard. The pilot said that he starboarded just before the collision, until he saw that the Annie was not going to clear her; then he ported to avoid her, about half a minute before the collision, and the collision occurred "just as the Blue Bonnet was inclined to feel the effect of the port wheel;" and he says the Annie ported at the same time he did. The lookout, and one or two other witnesses on the part of the Blue Bonnet, testify that at the time of the collision the Blue Bonnet had come to a dead stop under reversed engines; but this is not compatible with other testimony, especially with that of the engineer, who testifies that he felt the blow of the collision; that the signal to stop was not over five seconds previous, and the engine had come to a stop only two or three seconds before the collision, and was not reversed until they afterwards went up into the canal.

On this view of the testimony, while it is obvious that the Annie is chiefly to blame for the collision, being without encumbrance, under perfect control, and having at least very nearly the whole northerly half of the stream at her disposal, the Blue Bonnet cannot be held without fault. Her tow extended out at least to the middle line of the river, in a short curve of a narrow stream, towards which the flood tide was directly setting. The situation was one of evident danger from a vessel approaching with the tide from below, and demanded special caution on the part of the Blue Bonnet as well as the Annie. The tug and tow might, according to their own testimony, have gone within 30 feet of the southerly shore; at least 50 feet nearer than, upon the testimony, I feel compelled to find they were going. This alone would have avoided the Annie. The tug might also have ported, or have stopped her engines, earlier than she did, or she might have backed somewhat, if necessary, which she did not do at all. If due watch was kept of the approaching propeller from the time when the exchange of signals was given, when they were half a mile apart, which watch the Blue Bonnet was bound to keep, the dangerous course of the Annie towards the Blue Bonnet must have been observed upon the latter in time to have ported, or stopped her engines earlier than was done; and a little more promptness in either would also have avoided the collision. Her captain came upon deck a little before the collision and says that he saw at once that the steamers would hit. In such a dangerous bend in a narrow river a tug does not exercise due caution if she cause her tow to occupy unnecessa-

rily the full half of the stream; if she does so, it is her duty, upon the first indication of possible danger from another vessel approaching with the current, to change her course and give way betimes, as much and as early as possible. The tug had sufficient room to do so. She must have been at least 125 feet from the shore, and probably more than that, and there was no obstruction in that direction. She did port, as she ought to have done earlier, but too late to be of any service; and no previous signals of danger were given. In not giving any such additional signals, and especially in her failure to give way by porting or stopping, or in attempting to do either, until too late, there was such a want of that vigilance and caution which the situation demanded of her, that the Blue Bonnet must also be held in fault.

A decree should be entered against both vessels, with the usual order of reference.

THE PAUL REVERE.

(District Court, S. D. New York. January 27, 1882.)

1. SEAMEN'S WAGES—EFFECT OF CONSUL'S DISCHARGE.

Where a consul has by statute jurisdiction to grant a discharge, his certificate thereof, duly authenticated, is a bar to a seaman's claim for wages subsequent to his discharge.

2. SAME.

Where, upon the proceedings before the consul on a charge of criminal misconduct, it does not appear that any question was made concerning the seaman's wages at the time of his discharge, the seaman is not precluded from claiming any wages which may, upon the merits, appear to be due to him.

3. SEAMEN—PUNISHMENT FOR MISCONDUCT.

Double punishment through loss of wages, in addition to confinement on board, is not to be imposed except in cases where the seaman is incorrigibly disobedient, and his confinement is necessary to the safety of the ship, in consequence of his own dangerous character.

4. SAME—DOUBLE PUNISHMENT WHEN NOT IMPOSED—CASE STATED.

Where the cook (colored) shipped for a voyage from New York to Yokohama and back, and when two months out, in an affray with the steward, fired two shots of a small pistol, by which the steward received a flesh wound in the wrist, and it appeared that the steward was a man of a quarrelsome and dangerous character; that the affray was the result of several previous quarrels and challenges to fight; and it appearing that aside from this affray the cook was neither quarrelsome nor dangerous in his ordinary behavior, and had previously applied to the captain for protection against the steward; and that immediately after the firing he was arrested without resistance, put in irons by

the orders of the master, and kept in confinement during the following four months until after the arrival at Yokohama, and that his conduct during this time was good, and permission to return to duty had been repeatedly sought from the captain by himself and others of the crew, *held*, that the cook was entitled to his wages up to the time of his discharge at Yokohama.

In Admiralty. Action for seaman's wages.

This action was brought by the libellant (colored) to recover his wages as cook on board the ship Paul Revere, on her voyage from New York to Yokohama and back, from June 24 to September 24, 1879. On Sunday morning, September 1, 1878, about two months after the commencement of the voyage, an affray between the cook and the steward took place in the galley, in the course of which the cook fired two shots of a small pistol at the steward, by one of which the steward was wounded in the wrist. The libellant was immediately seized, put in irons, and kept so, for the most part, as the mate testified, until about a month before reaching Yokohama, when, being sick, the irons were removed from him, though he was still kept under restraint. The vessel arrived at Yokohama on December 24, 1878, and on the sixth of January the captain made a complaint in writing against the libellant before the consul of an assault with a deadly weapon. Upon the following day the libellant was brought before the consul, who, on the seventh, eighth, and ninth of that month, examined the steward, the first and second officers, and the carpenter of the vessel. On the thirtieth of January he rendered a decision as follows:

"After careful consideration of the evidence in this matter, and in view of the fact that the weapon used by the accused is scarcely more than a toy, and that it would have been very difficult with it to have made a dangerous wound, and that it therefore hardly comes within the definition of a 'dangerous weapon,' and the accuser exhibiting himself as a man of irascible temper, and the evidence showing that the offence charged against the accused was the result of an altercation, one of many between the same parties, and that the accuser has been discharged the ship by consent of the master, the latter considering him a troublesome and violent man, and that the accused has now been a long time in confinement:

"I am of opinion that the offence charged is not of such a serious character as to warrant me in subjecting the government to the expense of transportation of the accused and that of the witnesses to the United States, and of his trial there, and I consider that he has been sufficiently punished already.

"It is therefore ordered that he be discharged from arrest.

[Signed]

"THOS. B. VAN BUREN, Consul General.

"Yokohama, January 31, 1879.

"On being discharged from arrest, Jackson expressed an unwillingness to return on board ship and asked for his discharge, and the captain consenting, he was accordingly discharged, the ship paying into the consulate one month's extra wages.

[Signed]

THOS. B. VAN BUREN, Consul General.

"January 31, 1879."

The proceedings before the consul were duly certified and read upon the trial. The consul's certificate of the discharge of Jackson, "according to law," on January 31, 1879, was also proved, together with the receipt by the consul of one month's extra wages.

Alexander & Ash, for libellant.

Henry Heath, for claimant.

BROWN, D. J. The consul at Yokohama had jurisdiction of proceedings to discharge the seaman upon his own application and with the master's consent. His certificate of such a discharge, duly proved and authenticated, is therefore conclusive, and bars any claim by the libellant to subsequent wages. *Coffin v. Weld*, 2 Low. 81; *Lamb v. Briard*, 5 Abb. Adm. 367; *Tingle v. Tucker*, Id. 919.

The proceedings before the consul do not show that any question was made before him concerning the wages which might be due to the libellant up to the time of his discharge, or that any inquiry or consideration was given to that subject. The libellant is, therefore, not precluded by those proceedings from claiming anything to which, upon the merits, he may be entitled. *Hutchinson v. Coombs*, 1 Ware, 65; *The Nimrod*, Id. 9.

The affray on the morning of September 1st was the result of repeated quarrels between the cook and the steward during the two months previous. The steward is shown to have been of a quarrelsome disposition, and he was discharged at Yokohama. According to the libellant's account of the affray upon the trial, after high words between them in the galley the steward had rushed out, and presently came back to the door of the galley with one hand in his pocket, holding the handle of a knife, recognized by the cook as having a long blade, and with violent language challenged him to come out and fight; that the cook asked him what he had in his pocket, and told him to go away; that the steward then rushed towards him; and that the libellant thereupon, believing his life in danger, standing in the doorway of his own room leading from the galley, fired at him twice with a pistol. The steward testified before the consul that the cook had first challenged him to fight, and that he had afterwards

come to the door of the galley and renewed the challenge; that the instrument in his hand was a can-opener and not a knife. When the mate and captain, upon hearing the pistol shots, immediately went to the galley, no resistance was made by the cook; but he said he was sorry he had not killed him. No complaint was made of the subsequent conduct of the cook, nor did he at any time show any evidences of an ugly disposition. Several times during his confinement he requested to be allowed to go on duty. Similar requests in his behalf were made by others of the crew, none of which were acceded to by the captain. The pistol was not owned by Jackson, but had been given to him to be exchanged abroad for some foreign article. It was scarcely capable of inflicting a serious wound. The ball from it lodged in the steward's wrist, but inflicted only a flesh wound, which disabled his hand for two days only.

The captain was examined before the consul, and his deposition was also taken in this case. From these it does not appear that he ever instituted any inquiry into the particular causes of the affray, but he was familiar with the previous quarrelling between the cook and the steward, as he had shortly before, when appealed to by the cook for some protection against the steward, told him to get along as well as he could. From the violent character of the steward it is not certain that the cook did not have reasonable cause to believe himself in danger when the steward approached him from the galley door before he fired; but the fact that he had a pistol at hand, ready for use, and his language when arrested immediately after firing, show, not only that he was at the time in great passion, but also that his act was not merely an act of self-defence. The circumstances, while not sufficient to furnish a justification, do show much palliation in the degree of his offence. His long subsequent confinement by the master until the arrival at Yokohama was considered by the consul in his decision a sufficient punishment. In my judgment it was altogether more than was warranted at the hands of the master, having reference only to the character of the cook himself, and it may be that the confinement of the cook till arrival at Yokohama was quite as much an act of prudence and protection to him, in consequence of the quarrelsome and dangerous character of the steward, and the captain's belief that it was necessary to keep them apart. Aside from this consideration, the evidence does not show sufficient in the general behavior of the cook to warrant the prevention of his subse-

quent return to duty, as he desired. To inflict upon him, under these circumstances, loss of wages also, would be imposing a double punishment.

In the case of *Brower v. The Maiden*, Gilp. 296, *Hopkinson, J.*, says:

“When seamen are confined on board for any misconduct or disobedience, has it ever been pretended that their wages stop, or are therefore forfeited during confinement? I know of no such case. Their imprisonment is their punishment, and forfeiture of wages has not been added to it.” See, also, *Bray v. The Ship Atlanta*, Bee, 48; *Wood v. The Nimrod*, Gilp. 83, 89; *Jay v. Almy*, 1 Wood & M. 262; *Thorn v. White*, 1 Pet. Ad. 168, 175.

It is only where a mariner is incorrigibly disobedient, and his confinement, in consequence of his own dangerous character, is necessary to the safety of the ship, that a forfeiture of wages has also been imposed. It would be not only unjust to the seaman, but highly impolitic and dangerous as a precedent, to permit the vessel to make a profit by the confinement of seamen on board except in cases of this description. The proofs in this case fall far short of that, and the libellant should, therefore, recover his wages up to January 31, 1879, at the rate of \$30 per month, less \$60 advanced to him, with costs.

GUITEAU'S CASE.

Charge of Judge Cox, of the District of Columbia, delivered on the twenty-fifth day of January, 1882, in the celebrated case of Charles J. Guiteau for the assassination of James A. Garfield, late president of the United States, on the second day of July, 1881. Plea of insanity. Verdict: Guilty.

THE COURT. *Gentlemen of the Petit Jury:*

The constitution of the United States provides that—

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.”

These provisions are deemed the indispensable safeguards of life and liberty. They are intended for the protection of the innocent from injustice and oppression. It is only by their faithful observance that guilt or innocence can be fairly ascertained.

Every accused person is presumed innocent until the accusation be proved, and until such proof no court dare to prejudge his cause or withhold from him the protection of this fundamental law.

With what difficulty and trial of patience this law has been administered in the present case, you have been daily witnesses.

After all, however, it is our consolation that not one of these sacred guaranties has been violated in the person of the accused.

If he be guilty, no man deserves their protection less than he does. If he be innocent, no man needs their protection more, and no man's case more clearly proves their beneficence and justice.

At length the long chapter of proof is ended; the task of the advocate is done; and the duty now rests with you of determining, with such aid as I can afford you, the issue between public justice and the prisoner at the bar.

No one can feel more keenly than I do the grave responsibility of my duty; and I feel that I can only discharge it by a close adherence to the law as it has been laid down by its highest authorized expounders.

Before proceeding, I wish to interject here a remark upon an epi-

sode in the trial pending the last argument. The prisoner has taken repeated occasions to proclaim that public opinion, as evidenced by the press and by his correspondence, is in his favor. As you well know, these declarations could not have been prevented except by resorting to the process of gagging him. Any suggestion that you could be influenced by this lawless babble of the prisoner, would have seemed to me simply absurd, and I should have felt that I had almost insulted your intelligence if I had warned you not to regard it. The counsel for the prosecution have been rebuked for allowing these declarations to go to you without contradiction, and in the course of the final argument they felt it necessary to interpose a contradiction to these declarations of the prisoner, and the latter's counsel excepted to the form in which the contradiction was made. For the sole purpose of purging this record of any apparently objectionable matter, I would simply say, here, that nothing that has been said in reference to public sentiment or newspaper opinion, on either side, is to be regarded by you, although I really feel that such an admonition from me is totally unnecessary.

This indictment charges the defendant with having murdered James A. Garfield.

It becomes my duty, in the first place, to explain to you the nature of the crime charged.

With us, murder is committed where a person of sound memory and discretion unlawfully kills a reasonable creature in being, and in the peace of the United States, with malice aforethought.

It must of course be proved, first, that the death was caused by the act of the accused.

It must be further shown that it was caused with malice aforethought; but this does not mean that the government must prove any special ill-will, hatred, or grudge, on the part of the prisoner, towards the deceased. Whenever a homicide is shown to have been committed without lawful authority and with deliberate intent, it is sufficiently proved to have been done with malice aforethought. And this evidence is not answered and malice is not disproved, by showing that the accused had no personal ill-will against the deceased, but killed him from some other motive, as for purpose of robbery, or by mistaking him for another, or, as alleged in this case, to produce a public benefit.

If it could be shown that the killing occurred in the heat of passion and on sudden quarrel, and under provocation from the deceased, then it would appear that there was no premeditated intent, and con-

sequently no malice aforethought; and this would reduce the crime to manslaughter. But it is hardly necessary to say that there is nothing of that kind in the present case. You will probably see that either the defendant is guilty of murder or he is innocent.

But, in order to constitute the crime of murder, the assassin must have a responsibly sane mind. The technical term, "sound memory and discretion," in the old common-law definition of murder, means this. An irresponsibly insane man can no more commit murder than a sane man can do so without killing. His condition of mind cannot be separated from the act. If he is laboring under disease of his mental faculties—if that is a proper expression—to such an extent that he does not know what he is doing, or does not know that it is wrong, then he is wanting in that sound memory and discretion which make a part of the definition of murder.

In the next place, I instruct you that every defendant is presumed innocent until the accusation against him is established by proof.

In the next place, notwithstanding this presumption of innocence, it is equally true that a defendant is presumed to be sane and have been so at the time when the crime charged against him was committed; that is to say, the government is not bound, as a part of its proofs, to show, affirmatively, that the defendant was sane. As insanity is the exception, and most men are sane, the law presumes the latter condition of everybody until some reason is shown to believe the contrary. The burden is therefore on the defendant, who sets up insanity as an excuse for crime, to bring forward his proofs, in the first instance, to show that that presumption is a mistake as far as it relates to him.

The crime, then, involves three elements, viz.: The killing, malice, and a responsible mind in the murderer.

But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned,—*i. e.*, that the defendant is innocent till he is proved guilty, and that he is and was sane, unless evidence to the contrary appears,—and considering the whole evidence in the case, still entertain what is called a reasonable doubt, on any ground, (either as to the killing, or the responsible condition of mind,) whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal.

But here it becomes important to explain to you, in the best way that I can, what is a reasonable doubt. I can hardly venture to give

you an exact definition of the terms, for I do not know of any successful attempt to do so.

As to questions relating to human affairs, a knowledge of which is derived from testimony, it is impossible to have the same kind of certainty which is created by scientific demonstration. The only certainty you can have is a moral certainty, which depends upon the confidence you have in the integrity of witnesses, and their capacity to know the truth.

If, for example, facts not improbable are attested by numerous witnesses who are credible, consistent, and uncontradicted, and who had every opportunity of knowing the truth, a reasonable or moral certainty would be inspired by their testimony. In such case, a doubt would be unreasonable, or imaginary, or speculative, which the books say it ought not to be. And it is not a doubt whether the party may not *possibly* be innocent in the face of strong proof of his guilt, but a sincere doubt whether he has been proved guilty, that is called reasonable.

And even where the testimony is contradictory, so much more credit may be due to one side than the other, that the same result will be produced.

On the other hand, the opposing proofs may be so nearly balanced that the jury may justly doubt on which side lies the truth, and, in such case, the accused party is entitled to the benefit of the doubt.

As certainty advances, doubt recedes. If one is reasonably certain, he cannot, at the same time, be reasonably doubtful, *i. e.*, have a reasonable doubt, of a fact. All that a jury can be expected to do is to be reasonably or morally certain of the fact which they declare by their verdict.

As Chief Justice Shaw says, in *Com. v. Webster*, 5 Cush. 320:

"For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

With regard to the evidence in this case, very little comment is required from the court, except upon one question, the others being hardly matters of dispute.

That the defendant fired at and shot the deceased president is abundantly proved, if you believe the testimony.

That the wound caused the death has been testified to by the surgeons most competent to speak on that subject, and they are uncontradicted.

That the homicide was committed with malice aforethought, if the defendant was capable of criminal intent and malice, can hardly be gainsaid if you will bear in mind what I have already said. It is not necessary to prove that any special and express hatred or malice was entertained by the accused towards the deceased. It is sufficient to prove that the act was done with deliberate intent, as distinct from an act done under the sudden impulse of passion, and in the heat of blood, and without previous malice.

Evidence has been exhibited to you tending to show that the defendant, in his own handwriting, admitted that he had conceived the idea of removing the president, as he calls it, some six weeks before the shooting, and had deliberated upon it, and come to a determination to do it, and that about two weeks before he accomplished it, he stationed himself for the purpose, but some relencings delayed the attempt. His preparation for it by the purchase of the pistol has been detailed to you. All these facts, if believed by you, come up to the full measure of proof required to establish what the law denominates *malice aforethought*.

And thus, I apprehend, that you will have little difficulty in reaching a conclusion as to all the elements that make up the crime charged in the indictment, unless it be the one of "sound memory and discretion," as it is called, which is only a technical expression for a sound mind. We now approach the difficult question in this case.

I have said that a man who is insane, in a sense that makes him irresponsible, cannot commit a crime.

The defence of insanity has been so abused as to be brought into great discredit. It has been the last resort in cases of unquestionable guilt, and has been the excuse to juries for acquittal, when their own and the public sympathy have been with the accused, and especially when the provocation to homicide has excused it according to public sentiment, but not according to law. For these reasons, it is viewed with suspicion and disfavor, whenever public sentiment is hostile to the accused. Nevertheless, if insanity be established to the degree that has been already, in part, and will hereafter further be explained, it is a perfect defence to an indictment for murder, and must be allowed full weight.

Now, it is first to be observed that we are not troubled in this case with any question about what may be called *total* insanity, such as

aving mania, or absolute imbecility, in which all exercise of reason is wanting, and there is no recognition of persons or things, or their relations.

But there is a debatable border-line between the sane and the insane, and there is often great difficulty in determining on which side of it a party is to be placed. There are cases in which a man's mental faculties generally seem to be in full vigor, but on some one subject he seems to be deranged. He is possessed, perhaps, with a belief which every one recognizes as absurd, which he has not reasoned himself into, and cannot be reasoned out of, which we call an *insane delusion*, or he has, in addition, some morbid propensity, seemingly in harsh discord with the rest of his intellectual and moral nature.

These are cases of what, for want of a better term, is called partial insanity.

Sometimes its existence, and at other times its limits, are doubtful and undefinable. And it is in these cases that the difficulty arises of determining whether the patient has passed the line of moral or legal accountability for his actions.

You must bear in mind that a man does not become irresponsible by the mere fact of being partially insane. Such a man does not take leave of his passions by becoming insane, and may retain as much control over them as in health. He may commit offences, too, with which his infirmity has nothing to do. He may be sane as to his crime, understand its nature, and be governed by the same motives in regard to it as other people; while on some other subject, having no relation to it whatever, he may be subject to some delusion. In a reported case, a defendant was convicted of cheating by false pretences, but was not saved from punishment by his insane delusion that he was the lawful son of a well-known prince. The first thing, therefore, to be impressed upon you is, that wherever this partial insanity is relied on as a defence, it must appear that the crime charged was the product of the delusion, or other morbid condition, and connected with it as effect with cause, and not the result of sane reasoning or natural motives, which the party may be capable of, notwithstanding his circumscribed disorder. The importance of this will be appreciated by you further on.

But, assuming that the infirmity of mind has had a direct influence in the production of crime, the difficulty is to fix the degree and character of the disorder which, in such case, will create irresponsibility in law. The outgivings of the judicial mind on this subject have not

always been entirely satisfactory or in harmony with the conclusions of medical science. Courts have, in former times, undertaken to lay down a law of insanity without reference to and in ignorance of the medical aspects of the subject, when it could only be properly dealt with through a concurrent and harmonious treatment by the two sciences of law and medicine. They have, therefore, adopted and again discarded one theory after another in the effort to find some common ground where a due regard for the security of society and humanity for the afflicted may meet. It will be my effort to give you the results most commonly accepted by the courts.

It may be well to say a word as to the evidence by which courts and juries are guided in this difficult and delicate inquiry.

That subtle essence which we call "mind" defies, of course, ocular inspection. It can only be known by its outward manifestations, and they are found in the language and conduct of the man. By these his thoughts and emotions are read, and according as they conform to the practice of people of sound mind, who form the large majority of mankind, or contrast harshly with it, we form our judgment as to his soundness of mind. For this reason evidence is admissible to show conduct and language at different times and on different occasions, which indicate to the general mind some morbid condition of the intellectual powers; and the more extended the view of the person's life the safer is the judgment formed of him. Everything relating to his physical and mental history is relevant, because any conclusion as to his sanity must often rest upon a large number of facts. As a part of the language and conduct, letters spontaneously written afford one of the best indications of mental condition.

Evidence as to insanity in the parents and immediate relatives is also pertinent. It is never allowed to infer insanity in the accused from the mere fact of its existence in the ancestors. But when testimony is given directly tending to prove insane conduct on the part of the accused, this kind of proof is admissible as corroborative of the other. And therefore it is that the defence have been allowed to introduce evidence to you covering the whole life of the accused, and reaching to his family antecedents.

In a case so full of detail as this I shall deem it my duty to you to assist you in weighing the evidence by calling your attention to particular parts of it. But I wish you distinctly to understand that it is your province, and not mine, to decide upon the facts; and if I, at any time, seem to express or intimate an opinion on them, which I

do not design to do, it will not be binding on you, but you must draw your own conclusions from the evidence.

The instructions that have been given you import, in substance, that the true test of criminal responsibility, where the defence of insanity is interposed, is whether the accused had sufficient use of his reason to understand the nature of the act with which he is charged, and to understand that it was wrong for him to commit it; that if this was the fact he is criminally responsible for it, whatever peculiarities may be shown about him in other respects; whereas, if his reason was so defective, in consequence of mental disorder, generally supposed to be caused by brain disease, that he could not understand what he was doing, or that what he was doing was wrong, he ought to be treated as an irresponsible person.

Now, as the law assumes every one at the outset to be sane and responsible, the question is, what is there in this case to show the contrary as to this defendant?

A jury is not warranted in inferring that a man is insane from the mere fact of his committing a crime, or from the enormity of the crime, or from the *mere apparent* absence of adequate motive for it, for the law assumes that there is a bad motive—that it is prompted by malice—if nothing else appears.

Perhaps the easiest way for you to examine into this subject is, *first*, to satisfy yourselves about the condition of the prisoner's mind for a considerable period of time before any conception of the assassination entered it, and at the present time, and then to consider what evidence exists as to a different condition at the time of the act charged.

I shall not spend any time on the first question, because to examine it at all would require a review of evidence relating to over 20 years of the defendant's life, and this has been so exhaustively discussed by counsel that anything I could say would be a wearisome repetition. Suffice it to say, that, on one side, this evidence is supposed to show a chronic condition of insanity for many years before the assassination; and, on the other, to show an exceptionally quick intellect and decided power of discrimination.

You must draw your conclusions from the evidence.

Was his ordinary, permanent, chronic condition of mind such, in consequence of disease, that he was unable to understand the nature of his actions, or to distinguish between right and wrong in his conduct? Was he subject to insane delusions that destroyed his power

of so distinguishing? And did this continue down to and embrace the act for which he is tried? If so, he was simply an irresponsible lunatic.

Or, on the other hand, had he the ordinary intelligence of sane people, so that he could distinguish between right and wrong, as to his own actions? If another person had committed the assassination, would he have appreciated the wickedness of it? 'If he had had no special access of insanity impelling him to it, as he claims was the case, would he have understood the character of such an act and its wrongfulness if another person had suggested it to him? If you can answer these questions in your own minds it may aid you towards a conclusion as to the normal or ordinary condition of the prisoner's mind before he thought of this act; and if you are satisfied that his chronic or permanent condition was that of sanity, at least so far that he knew the character of his own actions, and whether they were right or wrong, and was not under any permanent insane delusions which destroyed his power of discriminating between right and wrong as to them, then the only inquiry remaining is whether there was any special insanity connected with this crime; and what I shall further say will be on the assumption that you find his general condition to have been that of sanity to the extent I have mentioned.

On this assumption it will be seen that the reliance of the defence is on the existence of an insane delusion in the prisoner's mind which so perverted his reason as to incapacitate him from perceiving the difference between right and wrong as to this particular act.

As a part of the history of judicial sentiment on this subject, and by way of illustrating the relation between insane delusions and responsibility, I will refer to a celebrated case in English history already freely commented on in argument. Nearly 40 years ago one MacNaghten was tried in England for killing a Mr. Drummond, private secretary of Sir Robert Peel, mistaking him for the premier himself. He was acquitted on the ground of insanity, and his acquittal caused so much excitement that the house of lords addressed certain questions to the judges of the superior courts of England in regard to the law of insanity in certain cases, and their answers have been since regarded as settling the law on this subject in England, and, with some qualification, have been approved in the courts of this country. One of the questions was:

"If a person, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is he thereby excused?"

To which it was answered, that—

“In case he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with regard to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, *in self-defence*, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him *in revenge* for such supposed injury, he would be liable to punishment.”

This, you will understand, was because it was excusable to kill in self-defence, but not to kill in revenge for an injury.

This has been in part recognized as law in this country.

Thus Chief Justice Shaw, of Massachusetts, in the case of *Com. v. Rogers*, 7 Metc. 500, says:

“Monomania may operate as an excuse for a criminal act” when the “delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as when the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is, where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature.”

The cases I have referred to furnish an introduction to the subject of insane delusions, which plays an important part in this case, and demands careful consideration. We find it treated, to a limited extent, in judicial decisions, but learn more about it from works on medical jurisprudence and expert testimony. Sane people are said sometimes to have delusions, proceeding from temporary disorder and deception of the senses, and they entertain extreme opinions which are founded upon insufficient evidence, or result from ignorance, or they are speculations on matters beyond the scope of human knowledge; but they are always susceptible of being corrected and removed by evidence and argument.

But the *insane delusion*, according to all testimony, seems to be an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or, at least, impossible under the circumstances of the individual. A man, with no reason for it, believes that another is attempting his life, or that he himself is the owner of untold wealth, or that he has invented something which will revolutionize the world, or that he is president of the United States, or that he is God or Christ, or that he is dead, or that he is immortal, or

that he has a glass arm, or that he is pursued by enemies, or that he is inspired by God to do something.

In most cases, as I understand it, the fact believed is something affecting the senses. It may also concern the relations of the party with others. But generally the delusion centers around himself, his cares, sufferings, rights, and wrongs. It comes and goes independently of the exercise of will and reason, like the phantasms of dreams. It is, in fact, the waking dream of the insane, in which facts present themselves to the mind as real, just as objects do to the distempered vision in *delirium tremens*.

The important thing is that an insane delusion is never the result of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them.

A man may reason himself, and be reasoned by others, into absurd opinions, and may be persuaded into impracticable schemes and vicious resolutions, but he cannot be reasoned or persuaded into insanity or insane delusions.

Whenever convictions are founded on evidence, on comparison of facts and opinions and arguments, they are not insane delusions.

The insane delusion does not relate to mere sentiments or theories or abstract questions in law, politics, or religion. All these are the subjects of *opinions*, which are beliefs founded on reasoning and reflection. These opinions are often absurd in the extreme. Men believe in animal magnetism, spiritualism, and other like matters, to a degree that seems unreason itself, to most other people. And there is no absurdity in relation to religious, political, and social questions that has not its sincere supporters.

These opinions result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient *data*, ignorance of men and things, credulous dispositions, fraudulent imposture, and often from perverted moral sentiments. But still, they are *opinions*, founded upon some kind of evidence, and liable to be changed by better external evidence or sounder reasoning. But they are not insane delusions.

Let me illustrate further:

A man talks to you so strongly about his intercourse with departed spirits that you suspect insanity. You find, however, that he has witnessed singular manifestations, that his senses have been addressed by sights and sounds, which he has investigated, reflected on, and been unable to account for, except as supernatural. You see, at

once, that there is no insanity here; that his reason has drawn a conclusion from evidence.

The same man, on further investigation of the phenomena that staggered him, discovers that it is all an imposture and surrenders his belief.

Another man, whom you know to be an affectionate father, insists that the Almighty has appeared to him and commanded him to sacrifice his child. No reasoning has convinced him of his duty to do it, but the command is as real to him as my voice is now to you. No reasoning or remonstrance can shake his conviction or deter him from his purpose. This is an insane delusion, the coinage of a diseased brain, as seems to be generally supposed, which defies reason and ridicule, which palsies the reason, blindfolds the conscience, and throws into disorder all the springs of human action.

Before asking you to apply these considerations to the facts of this case let me premise one or two things.

The question for you to determine is, what was the condition of the prisoner's mind at the time when this tragedy was enacted? If he was sufficiently sane *then* to be responsible, it matters not what may have been his condition before or after. Still, evidence is properly admitted as to his previous and subsequent conditions, because it throws light, prospectively and retrospectively, upon his condition at the time. Inasmuch as these disorders are of gradual growth and indefinite continuance, if he is shown insane shortly before or after the commission of the crime, it is natural to *conjecture*, at least, that he was so at the time. But all the evidence must center around the time when the deed was done.

You have heard a good deal of evidence respecting the peculiarities of the prisoner through a long period of time before this occurrence, and it is claimed that he was, during all that time, subject to delusions calculated to disturb his reason and throw it from its balance. I only desire to say here that the only materiality of that evidence is in the probability it may afford of the defendant's liability to such disorder of the mind, and the corroboration it may yield to other evidence which may tend directly to show such disorder at the time of the commission of the crime.

A few words may assist you in applying to the evidence what I have thus stated.

You are to determine whether, at the time when the homicide was committed, the defendant was laboring under any insane delusion prompting and impelling him to the deed.

Very naturally you look, first, for any explanation of the act which may have been made by the defendant himself at the time or immediately before and after.

You have had laid before you, especially, several papers which were in his possession, and which purport to assign the motives for his deed.

In the address to the American people of June 16th, which seems most fully to set forth his views, he says:

"I conceived the idea of removing the president four weeks ago. Not a soul knew of my purpose. *I conceived the idea myself* and kept it to myself. I read the newspapers *carefully, for and against* the administration, and *gradually the conviction dawned on me that the president's removal was a political necessity*, because he proved a traitor to the men that made him, and thereby imperilled the life of the republic."

Again:

"Ingratitude is the basest of crimes. That the president, under the manipulation of his secretary of state, has been guilty of the basest ingratitude to the stalwarts, admits of no denial. The expressed purpose of the president has been to crush Gen. Grant and Senator Conkling, and thereby open the way for his renomination in 1884. In the president's madness he has wrecked the once grand old Republican party, *and for this he dies.*" * * *

Again:

"This is not murder. It is a political necessity. It will make my friend Arthur president, and save the republic," etc.

The other papers are of similar tenor, as I think you will find.

There is evidence that, when arrested, the prisoner refused to talk, but said that the papers would explain all.

On the night of the assassination, according to the witness James J. Brooks, the prisoner said to him that he had thought over it and prayed over it for weeks, and the more he thought and prayed over it the more satisfied he was that he had to do this thing. He *had made up his mind that he had done it as a matter of duty*; * * * he made up his mind that they (the president and Mr. Blaine) were conspiring against the liberties of the people, and that the president must die.

This is all that the evidence shows as to the prisoner's utterances about the time of the shooting.

In addition to this you have the very important testimony of the witness Joseph S. Reynolds as to the prisoner's statements, oral and written, made about a fortnight after the shooting. If you credit this testimony you find him reiterating the statements contained in the

other papers, but, perhaps, with more emphasis and clearness. He is represented as saying *that the situation at Albany suggested the removal of the president*, and as the factional fight became more bitter, he became more decided. He knew that Arthur would become president, and that would help Conkling, etc. *If he had not seen that the president was doing a great wrong to the stalwarts, he would not have assassinated him.*

In the address to the American people, then written, he says:

"I now wish to state distinctly why I attempted to remove the president. I had read the newspapers for and against the administration, very carefully, for two months, before I conceived the idea of removing him. Gradually, as the result of reading the newspapers, the idea settled on me that if the president was removed it would unite the two factions of the republican party, and thereby save the government from going into the hands of the ex-rebels and their northern allies. It was my own conception, and, whether right or wrong, I take the entire responsibility."

A second paper, dated July 19th, addressed to the public, reiterates this and concludes, "Whether he lives or dies, I have got the inspiration worked out of me."

We have now before us everything emanating from the prisoner about the time of the shooting and within a little over a fortnight afterwards. We have nothing further from him until over three months afterwards. Let us pause here to consider the import of all this.

You are to consider, first, whether this evidence fairly represents the true feelings and ideas which governed the prisoner at the time of the shooting. If it does, it represents a state of things which I have not seen characterized in any judicial utterance or authoritative work as an insane delusion.

You are to consider whether it is so described in the evidence, or does not, on the contrary, show a deliberate process of reasoning and reflection, upon argument and evidence for and against, resulting in an *opinion* that the president had betrayed his party, and that if he were out of the way it would be a benefit to his party, and save the country from the predominance of their political opponents. So far there was nothing insane in the *conclusion*. It was, doubtless, shared by a great many others. But the difference was that the prisoner, according to his revelations, went a step further, and reached the *conviction* that to put the president out of the way by assassination was a political necessity.

When men reason the law requires them to reason correctly, as far

as their practical duties are concerned. When they have the *capacity* to distinguish between right and wrong, they are bound to do it. Opinions, properly so called,—*i. e.*, beliefs resulting from reasoning, reflection, or examination of evidence,—afford no protection against the penal consequences of crime. A man may believe a course of action to be right, and the law, which forbids it, to be wrong. Nevertheless, he must obey the law, notwithstanding his convictions. And nothing can save him from the consequences of its violation, except the fact that he is so crazed by disease as to be unable to comprehend the necessity of obedience to it.

The Mormon prophets profess to be inspired, and to believe in the duty of plural marriages, although it was forbidden by a law of the United States. One of the sect violated the law, and was indicted for it. The judge who tried him instructed the jury—

“That if the defendant, under the influence of a religious belief that it was right,—under an inspiration, if you please, that it was right,—deliberately married a second time, having a first wife living, the want of consciousness of evil intent, the want of understanding that he was committing a crime, did not excuse him.”

And the supreme court of the United States, to which the case went, under the title of *Reynolds v. U. S.* 98 U. S. 145, in approving this ruling, said:

“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

“So, here, as a law of the organization of society, under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed, can a man excuse his practice to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name, under such circumstances.”

And so, in like manner, I say, a man may reason himself into a conviction of the expediency and patriotic character of political assassination, but to allow him to find shelter from punishment behind that belief, as an insane delusion, would be simply monstrous.

Between one and two centuries ago there arose a school of moral-

ists who were accused of maintaining the doctrine that whenever an end to be attained is right, any means necessary to attain it would be justifiable. They were accused of practicing such a process of reasoning as would justify every sin in the decalogue when occasion required it. They incurred the odium of nearly all Christendom in consequence. But the mode of reasoning attributed to them would seem to be impliedly, if not expressly, reproduced in the papers written by the defendant and shown in evidence:

"It would be a right and patriotic thing to unite the republican party and save the republic. Whatever means may be necessary for that object would be justifiable. The death of the president by violence is the only and therefore the necessary means of accomplishing it, and therefore it is justifiable. Being justifiable as a political necessity, it is not murder."

Such seems to be the substance of the ideas which he puts forth to the world as his justification in these papers. If this is the whole of his position, it presents one of those vagaries of opinion for which the law has no toleration, and which furnishes no excuse whatever for crime.

This, however, is not all that the defendant now claims.

There is, undoubtedly, a form of *insane delusion*, consisting of a belief by a person that he is inspired by the Almighty to do something,—to kill another, for example,—and this delusion may be so strong as to impel him to the commission of a crime.

The defendant, in this case, claims that he labored under such a delusion and impulse, or pressure, as he calls it, at the time of the assassination.

The prisoner's unsworn declarations, since the assassination, on this subject, in his own favor, are, of course, not evidence, and are not to be considered by you. A man's language, when sincere, may be evidence of the condition of his mind when it is uttered, but it is not evidence in his favor of the facts declared by him, or as to his previous acts or condition. He can never manufacture evidence in this way in his own exoneration.

It is true that the law allows a prisoner to *testify* in his own behalf, and thereby makes his sworn testimony on the witness-stand legal evidence, to be received and considered by you, but it leaves the weight of that evidence to be determined by you also.

I need hardly say to you that no verdict could safely be rendered upon the evidence of the accused party only, under such circumstances. If it were recognized, by such a verdict, that a man on trial for his life could secure an acquittal by simply testifying, him-

self, that he had committed the crime charged under a delusion, an inspiration, an irresistible impulse, this would be to proclaim in universal amnesty to criminals in the past, and an unbounded license for the future, and the courts of justice might as well be closed.

It must be perfectly apparent to you that the existence of such a delusion can be best tested by the language and conduct of the party immediately before and at the time of the act.

And while the accused party cannot make evidence *for* himself by his subsequent declarations, on the other hand, he may make evidence *against* himself, and, when those declarations amount to admissions against himself, they are evidence to be considered by a jury.

Let me here say a word about the characteristics of this form of delusion.

It is easy to understand that the conceit of being inspired to do an act may be either a sane belief or an insane delusion. A great many Christians believe, not only that events generally are providentially ordered, but that they themselves receive special providential guidance and illumination in reference to both their inward thoughts and outward actions, and, in an undefined sense, are inspired to pursue a certain course of action; but this is a mere sane belief, whether well or ill founded. On the other hand, if you were satisfied that a man sincerely, though insanely, believed that, like Saul of Tarsus, on his way to Damascus, he had been smitten to the earth, had seen a great light shining around him, had heard a voice from heaven, warning and commanding him, and that thenceforth, in reversal of his whole previous moral bent and mental convictions, he had acted upon this supposed revelation, you would have before you a case of imaginary inspiration amounting to an insane delusion.

The question for you to consider is, whether the case of the defendant presents anything analogous to this.

The theory of the government is that the defendant committed the homicide in the full possession of his faculties, and from perfectly sane motives; that he did the act from revenge, or perhaps from a morbid desire for notoriety; that he calculated deliberately upon being protected by those who were politically benefited by the death of the president, and upon some ulterior benefit to himself; that he made no pretense to *inspiration* at the time of the assassination, nor until he discovered that his expectations of help from the so-called

stalwart wing of the republican party were delusive, and that these men were denouncing his deed, and that then, for the first time, when he saw the necessity of making out some defence, he broached this theory of inspiration and irresistible pressure, forcing him to the commission of the act.

It this be true, you would have nothing to indicate the real motives of the act except what I have already considered. Whether it is true or not, you must determine from all the evidence.

It is true that the term "inspiration" does not appear in the papers first written by the defendant, nor in those delivered to Gen. Reynolds, except at the close of the one dated July 19th, in which he says that the *inspiration* is worked out of him; though what that means is not clear. It is true, also, that this was after, according to Gen. Reynolds, he had been informed how he was being denounced by the stalwart republicans.

In one of the first papers I have referred to, the president's removal was called an act of God, as were his nomination and election; but whether this meant anything more than that it was an act of God, in the sense in which all great events are said to be ordered by Providence, is not clear.

Dr. Noble Young testifies that a few days after defendant's entrance into the prison—a time not definitely fixed—he told him he was inspired to do the act, but qualified it by saying that if the president should die he would be confirmed in his belief that it was an inspiration; but if not, perhaps not.

The emphatic manner in which, in both the papers delivered to Gen. Reynolds, the defendant declared that the assassination was his *own conception* and execution, and *whether right or wrong* he took the entire responsibility, his detailed description of the manner in which the idea occurred to him, and how it was strengthened by his reading, etc., and his omission to state anything about a direct inspiration from the Deity at that time, are all circumstances to be considered by you on the question whether he then held that idea.

On the other hand, you have the prisoner's testimony in which he *now* asserts that he conceived himself to be under an inspiration at the time. He also advanced this claim in his interviews with the expert witnesses shortly before the trial.

It becomes necessary, then, to examine the case on the assumption that the prisoner's testimony may be true, and to ascertain from his declaration and testimony what kind of inspiration it is which he thus asserts.

According to the testimony of Dr. Strong, he inquired of the defendant if he claimed to have had any direct revelation from heaven, and the answer was that he *did not believe in any such nonsense*.

According to Dr. McDonald, who interviewed the prisoner on the thirteenth of November, he did not then, in terms, speak of his idea of removing the president as an inspiration, but as a conception of his own, and said that, after conceiving the idea, he tried to put it aside; that it was repulsive to him at first; that he waited a week or two, thinking over it and waiting for the Almighty to interfere. He had conceived the idea himself, but he wished the Almighty to have the opportunity of interfering to prevent its execution; and at the end of two weeks, no interference coming from the Almighty, he formed the deliberate purpose of executing the act, etc.

According to the testimony of Dr. Gray, the prisoner said that he had received no instructions, heard no voice of God, saw no vision in the night, or at any time; that the idea came into his own mind first, and after thinking over it and reading the papers, when he arrived at the conclusion to do the act, he *believed then it was a right act*, and was justified by the political situation.

When asked how he could apply this as an instruction from the Deity, he said it was a *pressure* of the Deity; *that this duty of doing it, as he claimed, had pressed him to it*.

Again, he said *he had not connected the Deity with the inception and development of the act; that it was his own*. He did not get the inspiration until the time came for it, and that the inspiration came when he had reached the conclusion and determination to do the act.

Perhaps the most remarkable of the prisoner's statements to Dr. Gray was that at the very time when he was planning the assassination, he was also devising a theory of insanity which should be his defence, which theory was to be that he believed the act of killing was an inspired act.

Perhaps equally remarkable was the prisoner's theory propounded in this conversation, viz., that he was not *medically* insane, but *legally* so, i. e., *irresponsible*, because the act was done *without malice*.

Finally, on this subject, you have the defendant's own testimony.

He does not profess to have had any visions or direct revelation or distorted conception of facts.

But he says that while pondering over the political situation the idea suddenly occurred to him that if the president were out of the way the dissensions of his party would be healed; that he read the papers with an eye on the possibility of the president's removal, and

the idea kept pressing on him; that he was horrified; kept throwing it off; did not want to give it attention; tried to shake it off; but it kept growing upon him, so that at the end of two weeks his mind was thoroughly fixed as to the necessity for the president's removal and the divinity of the inspiration. He never had the slightest doubt of the divinity of the inspiration from the first of June. He kept praying about it, and that if it was not the Lord's will that he should remove the president there would be some way by which His providence would intercept the act. He kept reading the newspapers, and his inspiration was *being confirmed every day, and since the first day of June he has never had a doubt about the divinity of the act.*

In the cross-examination he said: If the political necessity had not existed the president would not have been removed—there would have been no necessity for the inspiration. About the first of June he made up his mind as to the inspiration of the act, and the necessity for it; from the sixteenth of June to the second of July he prayed that *if he was wrong*, the Deity would stop him by His providence; in May it was an embryo inspiration—a mere impression that possibly it might have to be done; he was doubting whether it was the Deity that was inspiring him, and was praying that the Deity would not let him make a mistake about it; and that at last it was the Deity, and not he, who killed the president.

Again, the confirmation that it was the Deity, and not the devil, who inspired the idea of removing the president, came to him in the fact that the newspapers were all denouncing the president. He saw that the political situation required the removal of the president, and that is the way he knew that his intended act was inspired by the Deity; but for the political situation, he would have thought that it came from the devil.

This is the substance of all that appears in the case on the subject of inspiration.

It is proper to call your attention to some variations in the prisoner's statements at different times.

In two of the papers of July he says it *was his own conception*, and he took the *entire responsibility*.

In the conversations reported by Dr. Gray, in November, he did not connect the Deity with the inception of the act. The conception was his own, and the inspiration came after he made up his mind; but he does not explain what he meant by the inspiration, unless it was that it was a pressure upon him, or, as he expresses it, the duty of doing it was pressing upon him.

In his testimony *he disclaims all responsibility*, while he still speaks of the idea of removing the president as an impression which arose in his own mind first. He says that in his reflections about it he debated with himself whether it came from the Deity or the devil; prayed that God would prevent it if it was not His will; and finally made up his mind, from a consideration of the political situation, that it was inspired by Him.

On all this the question for you is, whether, on the one hand, the idea of killing the president first presented itself to the defendant in the shape of a command or inspiration of the Deity, in the manner in which insane delusions of that kind arise, of which you have heard much in the testimony; or, on the other hand, it was a conception of his own, followed out to a resolution to act; and if he thought at all about inspiration, it was simply a speculation or theory, or theoretical conclusion of his own mind, drawn from the expediency or necessity of the act, that his previously-conceived ideas were inspired.

If the latter is a correct representation of his state of mind it would show nothing more than one of the same vagaries of reasoning that I have already characterized as furnishing no excuse for crime.

Unquestionably a man may be insanely convinced that he is inspired by the Almighty to do an act, to a degree that will destroy his responsibility for the act.

But, on the other hand, he cannot escape responsibility by baptizing his own spontaneous conceptions and reflections and deliberate resolves with the name of *inspiration*.

On the direct question whether the prisoner knew that he was doing wrong at the time of the killing, the only direct testimony is his own, to the contrary effect.

One or two circumstances may be suggested as throwing some light on the question.

The declaration that, *right or wrong*, he took the responsibility, made shortly afterwards, may afford some indication whether the question of wrong had suggested itself. And his testimony that he was horrified when the idea of assassination first occurred to him, and he tried to put it away, is still more pertinent.

His statement, testified to by Dr. Gray, that he was thinking of the defence of inspiration while the *assassination* was being planned, tends to show a knowledge of the *legal* consequences of the killing. His present statement, that no punishment would be too quick or severe for him if he killed the president otherwise than as agent of the Deity,

shows a present knowledge of the wrongfulness of the act in itself; but this declaration is of value on this question of knowledge, only in case you should believe that he had the same appreciation of the act at the time of its commission and disbelieve his story about the inspiration.

I have said nearly all that I need say on the subject of insane delusion.

The answer of the English judges, that I have referred to, has not been deemed entirely satisfactory, and the courts have settled down upon the question of knowledge of right and wrong as to the particular act, or rather the capacity to know it, as the test of responsibility; and the question of insane delusion is only important as it throws light upon the question of knowledge of, or capacity to know, the right and wrong.

If a man is under an insane delusion that another is attempting his life, and kills him in self-defence, he does not know that he is committing an unnecessary homicide. If a man insanely believes that he has a command from the Almighty to kill, it is difficult to understand how such a man *can* know that it is wrong for him to do it. A man may have some other insane delusion which would be quite consistent with a knowledge that such an act is wrong,—such as, that he had received an injury,—and he might kill in revenge for it knowing that it would be wrong.

And I have dwelt upon the question of insane delusion, simply because evidence relating to that is evidence touching the defendant's power, or want of power, from mental disease, to distinguish between right and wrong, as to the act done by him, which is the broad question for you to determine, and because that is the kind of evidence on this question which is relied on by the defence.

It has been argued with great force, on the part of the defendant, that there are a great many things in his conduct which could never be expected of a sane man, and which are only explainable on the theory of insanity. The very extravagance of his expectations in connection with this deed—that he would be protected by the men he was to benefit, would be applauded by the whole country when his motives were made known—has been dwelt upon as the strongest evidence of unsoundness.

Whether this and other strange things in his career are really indicative of partial insanity, or can be accounted for by ignorance of men, exaggerated egotism, or perverted moral sense, might be a question

of difficulty. And difficulties of this kind you might find very perplexing, if you were compelled to determine the question of insanity generally, without any rule for your guidance.

But the only safe rule for you is to direct your reflections to the one question which is the test of criminal responsibility, and which has been so often repeated to you, viz., whether, whatever may have been the prisoner's singularities and eccentricities, he possessed the mental capacity, at the time the act was committed, to know that it was wrong, or was deprived of that capacity by mental disease.

In all this matter there is one important distinction that you must not lose sight of, and you are to decide how far it is applicable to this case. It is the distinction between mental and moral obliquity; between a mental incapacity to understand the distinctions between right and wrong, and a moral indifference and insensibility to those distinctions. The latter results from a blunted conscience, a torpid moral sense or depravity of heart; and sometimes we are not inapt to mistake it for evidence of something wrong in the mental constitution. We have probably all known men of more than the average of mental endowments, whose whole lives have been marked by a kind of moral obliquity and apparent absence of the moral sense. We have known others who have first yielded to temptation with pangs of remorse, but each transgression became easier, until dishonesty became a confirmed habit, and at length all sensitiveness of conscience disappeared.

When we see men of seeming intelligence and of better antecedents reduced to this condition, we are prone to wonder whether the balance-wheels of the intellect are not thrown out of gear. But indifference to what is right is not ignorance of it, and depravity is not insanity, and we must be careful not to mistake moral perversion for mental disease.

Whether it is true or not that insanity is a disease of the physical organ, the brain, it is clearly in one sense a disease, when it attacks a man in his maturity. It involves a departure from his normal and natural condition. And this is the reason why an inquiry into the man's previous condition is so pertinent, because it tends to show whether what is called an act of insanity is the natural outgrowth of his disposition or is utterly at war with it, and therefore indicates an unnatural change.

A man who is represented as having been always an affectionate parent and husband, suddenly kills wife and child. This is something so unnatural for such a man that a suspicion of his insanity arises at

once. On further inquiry we learn that instead of being as represented, the man was always passionate, violent, and brutal in his family. We then see that the act was the probable result of his bad passions, and not of a disordered mind.

Hence the importance of viewing the moral as well as intellectual side of the man, in the effort to solve the question of sanity.

That evidence on this subject is proper was held by the supreme judicial court of New Hampshire in *State v. Jones*, 50 N. H. Judge Ladd said:

"The history of the defendant and evidence of his conduct at various times during a period of many years before the act for which he was tried, tending to show his temper, disposition, and character, were admitted against his objection. It was for the jury to say whether the act was the product of insanity, or the naturally malignant and vicious heart. The condition of the man's mind, whether healthy or diseased, was the very matter in issue. This must be determined in some way or other from external manifestations as exhibited in his conduct. To know whether an act is the product of a diseased mind it is important to ascertain, if possible, how the same mind acts in a state of health. The condition of sanity or insanity shown to exist at one time is presumed to continue. For these reasons and others, which I have not thought it necessary to enlarge upon, it would seem that evidence tending to show defendant's mental and moral character and condition for many years before the act, was properly received."

It was upon the principle enunciated in this case that evidence was received in the present case tending to show the moral character of the accused, and offered for the purpose of showing that eccentricities relied on as proof of unsound mind were accounted for by want of moral principle.

From the materials that have been presented to you two pictures have been drawn by counsel.

The one represents a youth of more than the average of mental endowments, surrounded by certain demoralizing influences at a time when his character was being developed; starting in life without resources, but developing a vicious sharpness and cunning; conceiving "enterprises of great pith and moment," that indicated unusual forecast, though beyond his resources; consumed all the while by insatiate vanity and craving for notoriety; violent in temper, selfish in disposition, immoral, and dishonest in every direction; leading a life, for years, of hypocrisy, swindling, and fraud; and finally, as the culmination of a depraved career, working himself into a resolution to startle the country with a crime that would secure him a bad eminence, and, perhaps, a future reward.

The other represents a youth born, as it were, under malign influences, the child of a diseased mother, and a father subject to religious delusions; deprived of his mother at an early age; reared in retirement and under the influence of fanatical religious views; subsequently, with his mind filled with fanatical theories, launched upon the world with no guidance save his own impulses; then evincing an incapacity for any continuous occupation; changing from one pursuit to another—now a lawyer, now a religionist, now a politician—unsuccessful in all; full of wild impracticable schemes, for which he had neither resources nor ability; subject to delusions about his abilities and prospects of success, and his relations with others; his mind incoherent and incapable of reasoning connectedly on any subject; withal, amiable, gentle, and not aggressive, but the victim of surrounding influences, with a mind so weak and a temperament so impressible that, under the excitement of political controversy, he became frenzied and insanely deluded, and thereby impelled to the commission of a crime, the guilt of which he could not, at the moment, understand.

It is for you to determine which of these is the portrait of the accused.

Before saying a last word my attention has just been called to, and I have been requested by counsel for the defendant to give, certain additional instructions. One is—

“It is the duty of each juror to consider the evidence, all pertinent remarks of counsel, and all the suggestions of fellow-jurors, but to disregard all statements of counsel and declarations of the prisoner except such as are founded upon the evidence.”

Of course, that is a truism, and does not require any particular instruction.

“The testimony of the prisoner they will weigh as to credibility, and judge of by the same rules and considerations applied to that of other witnesses.”

That is all true, provided that all the influences that governed the prisoner are duly weighed and considered.

“And after all, each juror should decide for himself upon his oath as to what his verdict should be. No juror should yield his deliberate, conscientious conviction as to what the verdict should be, either at the instance of a fellow-juror or at the instance of a majority. Above all, no juror should yield his honest convictions for the sake of unanimity, or to avert the disaster of a mistrial. Jurors have nothing to do with the consequences of their verdict.”

All that, gentlemen, is true. Some of it is substantially embodied I think, in what I have already said.

"The opinions of experts upon the question of the sanity or insanity of the prisoner on the second day of July last, which is the only date as to which it is necessary for the jury to agree upon, on that question, rests wholly upon the hypothetical questions proposed to them, and the jury must believe, from the evidence, that the supposed facts stated in a hypothetical question are true, to entitle the answer thereto to any weight."

I cannot give that one because I think their opinions may be founded upon other grounds than the assumed truth of the hypothetical question; or, at least, that is a question for the jury.

The fact of insanity or sanity of the prisoner before or after the second day of July, 1881, is not in issue in this case, except as collateral to the main fact of sanity or insanity at the time of shooting of President Garfield, on the second day of July, 1881; and the only evidence as to such main fact is in the testimony of the prisoner himself, his words and acts, and the testimony of the experts in answer to the hypothetical question."

That is, I think, one that I cannot give, because the question involved is one of fact for the jury.

And now, to sum up all that I have said, in a few words:

If you find from the whole evidence that, at the time of the commission of the homicide, the prisoner, in consequence of disease of mind, was laboring under such a defect of his reason that he was incapable of understanding what he was doing, or that it was wrong,—as, for example, if he was under an insane delusion that the Almighty had commanded him to do the act, and in consequence of that he was incapable of seeing that it was a wrong thing to do,—then he was not in a responsible condition of mind, and was an object of compassion, and not of justice, and ought to be now acquitted.

On the other hand, if you find that he was under no insane delusion, such as I have described, but had possession of his faculties and the power to know that his act was wrong, and of his own free will deliberately conceived, planned, and executed this homicide, then, whether his motive was personal vindictiveness or political animosity, or a desire to avenge a supposed political wrong, or a morbid desire for notoriety, or fanciful ideas of patriotism or of the divine will, or you are unable to discover any motive at all, the act is simply *murder*, and it is your duty to find him guilty.

Now gentlemen, retire to your rooms and consider this matter, and make due deliberation in the case of the United States against Guiteau.

Mr. Scoville. Is it not proper that your honor should instruct the

jury as to the form of their verdict, if they find him not guilty by reason of insanity?

The Court. (To the jury.) If you should think that the prisoner is not guilty by reason of insanity, it is proper for you to say so.

At this point (4 o'clock and 35 minutes P. M.) the jury retired to deliberate.

Mr. Scoville. I will also inquire, your honor, as to the exceptions; what is the practice?

The Court. The charge will be in print, and you can have the privilege of exception to any part of it.

Mr. Scoville. And also in relation to the questions of law which we asked your honor to instruct upon?

The Court. Yes.

At 4 o'clock and 55 minutes P. M. the court took a recess until 5 o'clock and 30 minutes P. M., the jury being in deliberation.

At 5 o'clock and 40 minutes the jury, accompanied with the marshal and bailiffs, returned to the box and were called, all answering to their names, as follows:

John P. Hamlin, Frederick W. Brandenburg, Henry J. Bright, Charles T. Stewart, Thomas H. Langley, Michael Sheehan, Samuel F. Hobbs, George W. Gates, Ralph Wormley, William H. Brawner, Thomas Heintz, and Joseph Prather.

The Clerk. Gentlemen of the jury, have you agreed upon a verdict?

Mr. Hamlin, (the foreman.) We have.

The Clerk. What say you? Is the defendant guilty or not guilty?

Mr. Hamlin, (the foreman.) Guilty as indicted, sir.

Mr. Scoville. If the court please—

[Great applause, with cries of "Silence!" from the bailiffs.]

Mr. Davidge. (Interposing excitedly.) Let the verdict of the jury be recorded first.

The Clerk. Gentlemen of the jury, hear your verdict as recorded. Your foreman says that the defendant, Charles J. Guiteau, is guilty as indicted. So say you all?

The Jury. (Omnes.) So say we all.

Mr. Scoville. If the court please, I desire to have the jury polled.

The Court. Let the jury be polled.

The Clerk. (Calling the roll.) John P. Hamlin, is the defendant guilty or not guilty?

John P. Hamlin. Guilty.

The Clerk. Frederick W. Brandenburg, is the defendant guilty or not guilty?

Frederick W. Brandenburg. Guilty.

The Clerk. Henry J. Bright, is the defendant guilty or not guilty?

Henry J. Bright. Guilty.

The Clerk. Charles F. Stewart, is the defendant guilty or not guilty?

Charles F. Stewart. Guilty.

The Clerk. Thomas H. Langley, is the defendant guilty or not guilty?

Thomas H. Langley. Guilty.

The Clerk. Michael Sheehan, is the defendant guilty or not guilty?

Michael Sheehan. Guilty.

The Clerk. Samuel F. Hobbs, is the defendant guilty or not guilty?

Samuel F. Hobbs. Guilty.

The Clerk. George W. Gates, is the defendant guilty or not guilty?

George W. Gates. Guilty.

The Clerk. Ralph Wormley, is the defendant guilty or not guilty?

Ralph Wormley. Guilty.

The Clerk. William H. Brawner, is the defendant guilty or not guilty?

William H. Brawner. Guilty.

The Clerk. Thomas Heinline, is the defendant guilty or not guilty?

Thomas Heinline. Guilty.

The Clerk. Joseph Prather, is the defendant guilty or not guilty?

Joseph Prather. Guilty.

The Prisoner. (Excitedly.) My blood be on the head of that jury; don't you forget it. That is my answer.

Mr. Scoville. I understand I have the time to file a motion.

The Court. You have four days within which to file the motion.

Mr. Scoville. If there is anything else that I ought to do just now, your honor, I hope I will not be cut off.

The Court. If you have a desire to move in arrest of judgment, you can file your motion for a new trial, and in arrest of judgment, and if that should be overruled, be heard afterwards.

Mr. Scoville. That is, the motion for a new trial will be first heard.

The Court. The motion for a new trial must be first heard, and in case you then think proper, a motion in arrest of judgment. But they must both be filed in four days. You reserve an exception to the refusal to granting your instructions and to the charge.

Mr. Scoville. Yes. And to the charge. I expect to have that in the morning, and I desire to express that more particularly.

The Court. Yes.

The Prisoner. (Excitedly.) God will avenge this outrage.

The Court. Gentlemen of the jury, I cannot express too much thanks to you, both in my own name and in the name of the public, for the diligence and fidelity with which you have discharged your duties; for the patience with which you have listened to this long mass of testimony, and the lengthy discussion by counsel; and for the patience with which you have borne with the privations and inconveniences incident to this trial. I am sure that you will take home with you the approval of your own consciences as you will have that of your fellow-citizens. With thanks and good wishes, I discharge you from any further service at this term of the court.

Thereupon (at 5 o'clock and 55 minutes P. M.) the court adjourned.

NOTE.

MORAL INSANITY. One of the incidental benefits arising from the Guiteau trial has been the development of the fact that the theory of moral insanity has no longer any professional medical opinion in its favor. In the London *Lancet* of December 12, 1881, we find the following:

"We fancied the 'plea of insanity' had been reduced to absurdity in the ridiculous attempt made to show that Lefroy was insane; but it seems that the apotheosis of stupidity is to take place in America. It is high time the nonsense recently talked and written about 'irresponsibility' should be exposed and ended. If the supreme triumph of medical psychology is to be sought in the attempt to prove that men are mere machines, and that the wrong they do is not their doing, but the outcome of disease, the sooner this branch of science is discountenanced by the common sense of the profession the better will it be for the credit and influence of our cloth. If a man is not acting under a recognizable and formulated delirium when he commits a crime, he is clearly responsible, and ought to be so held unless he is unquestionably, and on grounds other than those arising out of or associated with his crime, shown to be insane. The mistake into which 'experts' and those who follow their lead commonly fall is to confound the evidences of a neurotic constitution with the symptoms of mental disease. The inheritor of an organism which predisposes to insanity is not necessarily insane. Lefroy was not insane, and Guiteau is not insane. The only insanity accruing to the latter case is that which those who support the plea may themselves import into it. The position of matters in regard to this question is becoming one of exceeding gravity, and it will soon need to be very seriously discussed."

In the *North American Review* for January, 1882, we have opinions from eminent alienists,—Dr. Elwell, Dr. Beard, Dr. Seguin, Dr. Jewell, and Dr. Folsom,—by all of whom the theory of moral insanity, as such, is repudiated. The highest psychological authority is to the same effect. Sir William Hamilton, in defining the mind, says: "If we take the mental to the exclusion of material phenomena,—that is, the phenomena manifested through the medium of self-consciousness or reflection,—they naturally divide themselves into three categories or primary genera: the phenomena of *knowledge* or *cognition*, the phenomena

of *feeling* or of *pleasure and pain*, and the phenomena of *conation* or of *will and desire*." Mr. Bain, belonging to a very different school, arrives, in an authoritative work, substantially at the same result. *Ment. & Mor. Science*, (2d Ed.) 2. "The only account of mind strictly admissible in scientific psychology consists in specifying three properties or functions,—*feeling, will or volition, and thought or intellect*,—through which all our experience, as well objective as subjective, is built up. This positive enumeration is what must stand for a definition." He proceeds to say that "FEELING includes all our pleasures and pains, and certain modes of excitement, or of consciousness simply, that are neutral or indifferent as regards pleasure and pain. The pleasures of warmth, food, music, the pains of fatigue, *poverty, remorse*, the excitement of hurry and surprise, the supporting of a light weight, *the touch of a table, the sound of a dog barking in the distance*, are feelings. The two leading divisions of the feelings are commonly given as sensations or emotions." "WILL OR VOLITION comprises all the actions of human beings in so far as impelled or guided by feelings. Eating, walking, building, sowing, speaking are actions performed with some end in view; and ends are comprised in the gaining of pleasure or the avoiding of pain. *Actions not prompted by feeling are not voluntary*. Such are the powers of nature—wind, gravity, electricity, etc.; so, also, the organic functions of breathing, circulation, and the movements of the intestines." THOUGHT, INTELLECT, intelligence, or cognition, includes the powers known as perception, memory, conception, abstraction, reason, judgment, and imagination. It is analyzed, as will be seen, into three functions, called discrimination or consciousness of difference, similarity or consciousness of agreement, and retentiveness or memory. *The mind can seldom operate exclusively in any one of these three modes*. A feeling is apt to be accompanied more or less by will and by thought. When we are pleased, our will is moved for continuance or increase of the pleasure, (will;) we at the same time discriminate and identify the pleasure, and have it impressed on the memory, (thought.)"

If we apply this analysis to the hypothesis before us, we will see that the latter cannot stand. A man, for instance, is assaulted by another, or conceives himself so to be, so as to be in danger of losing either life or that which is more precious to him than life. FEELING is the first function of the mind which is here addressed; but this necessarily involves THOUGHT. "Is the assault intentional?" "Was it designed?" "Can I infer, judging from former assaults, or from what I have observed or heard, that it is aimed at life?" "Can it be repelled in no other way than by killing the assailant?" Pursuing inquiries such as these, FEELING, guided by THOUGHT, directs the WILL to the particular object. Without THOUGHT, FEELING would strike blindly into mere space. Even in the lowest point of view, discrimination is needed to distinguish the victim from others, and judgment to determine that killing him is a proper act of self-defence. THOUGHT, therefore, is necessarily involved in the act of killing, and the killing takes place because the assailant thinks it best. To constitute a valid plea of derangement in such a case, it is necessary to show that the perceptive and reasoning powers were deranged; otherwise, the case would not differ from that of homicide in a sudden fit of rage.

Or take the case of "kleptomania." The FEELING which lies at its base is

longing for some particular thing. But to shape as well as to effectuate this longing, THOUGHT must be invoked. Thought is needed to identify the object with that which previously gave gratification; to distinguish it from other objects: to secrete it; to carry it successfully away. In true kleptomania, so far from the derangement being distinctively in the feeling, such derangement is to be peculiarly traced to thought or intellect. It is no mark of derangement on entering a jewelry store to desire a brilliant that may lie on the counter. But to *think* either that it is right to take it, or that it can be taken without disgrace, assumes an abnormal and insane condition of intellect.

The same reasoning applies to all cases of alleged monomania. A child sets fire to a house, (pyromania.) Here the child selects the particular house by *thought*; applies the match with *thought*; is determined to the act by a mental process on whose sanity or insanity the question of responsibility depends. Or sexual propensity is yielded to without restraint, (erotomania;) and here, also, thought, in its lowest phases of memory, distinction, and identification, is necessary to procure gratification, while in its higher phase of reason and sense of right it must exist in a normal state to create responsibility. The insanity, in other words, cannot be psychologically shown, unless it affects *thought*.

The difficulty is that "moral insanity," in the popular acceptance of the term, includes two distinct diseases. The first, following the phraseology of Bain and Hamilton, as just stated, is that of enfeebled or paralyzed thought, approaching dementia. Here feeling, held in but slight check by the reasoning powers, acts on the will, involving thought only so far as is necessary to identify and secure the object of desire. The other case is that of delirious or deluded thought, where unreal objects are set up for feeling to desire. But in both cases the primary seat of the disease is in THOUGHT and INTELLECT.

How unsatisfactory are the analogies which are invoked to explain this alleged *separateness* of the moral sense, will readily be seen. The reason, the memory, the moral sense, it is declared, are each packed away in a series of hermetical compartments; and, so far from their mutually commingling, one may be actually insane without the others being in any sense affected. Man is thus like an iron steam-boat, whose hull is divided into a series of water-tight chambers, so arranged that if the rivets of one chamber loosen or its plates decay, the injury sustained is to itself alone. But it would be far more correct to compare the *ego* to the steamer's machinery, in which the derangement of one particular part is the derangement of the whole. Taking reason in its large sense, we must all admit that reason and the moral sense are in the highest degree interdependent. Thus, if an act is repugnant to our moral sense, the closest logical process will fail to convince us of its propriety. On the other hand, even if we should concede, as we have no right to do, that there is such a thing as an innate moral sense, we must accept the alternative that a moral sense is one which may be built up by education—penal discipline being one of the chief instruments by which this education can be imparted.*

DELUSIONS. The testimony of the experts, during the course of the trial, taken in connection with Judge Cox's charge, as given above, have gone a great way to finally establishing the rule that delusions to constitute a defence

*Parts of the above argument are taken from the forthcoming fourth edition of my book on Medical Jurisprudence, now in press.

must be objective as distinguished from subjective. They must be delusions of the senses, or such as relate to facts or objects, not mere wrong notions or impressions; and the aberration in such case must be mental, not moral, and must affect the intellect of the individual. It is not enough that they show a diseased or depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong continuing to exist, although it may be in a perverted condition. To enable them to be set up as a defence to an indictment for a crime, they must go to such crime objectively; *i. e.*, they must involve an honest mistake as to the object at which the crime is directed. See *Rex v. Burton*, 3 F. & F. 772; *Rex v. Townley*, 3 F. & F. 839.

The distinction before us may be illustrated by *Levett's Case*, which has never been questioned, and which has been sanctioned by the most rigid of the common-law jurists, where it was held a sufficient defence to an indictment for murder, that the mortal blow was struck by the defendant under the delusion that the deceased was a robber, who had entered the house. *Levett's Case*, Cro. Cas. 438; and see *Rex v. Townley*, *supra*. It would have been otherwise had the delusion been that the victim was a political opponent whom it was politic to remove. To this effect is the opinion of Chief Justice Shaw, in 1844, in *Com. v. Rogers*, 7 Metc. 500. "Monomania," said this eminent judge, "may operate as an excuse for criminal act," when "the delusion is such, that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature." To make such a delusion a defence, however, there must be no consciousness of the wrongfulness of the act to which the delusion prompts. If there be reason enough to dispel the delusion; if the defendant obstinately refuses, under such circumstances, to listen to arguments by which the delusion could be dispelled; if, on the contrary, he cherishes such delusion, and makes it the pretext of wrongs to others,—then he is responsible for such wrongs. Thus, in a case of homicide in Delaware, in 1851, the deceased being the defendant's wife, the defence was delusion consisting in a belief that his wife was untrue to him, that his children were begotten by his wife's intercourse with another, and that sundry conjurations were being practiced upon him, and the evidence showed that he was a shrewd and wealthy business man. The court charged the jury that if a person, otherwise rational, commit a homicide, though affected by delusions on subjects with which the act is connected, he is criminally responsible, if he were capable of the perception of consciousness of right and wrong as applied to the act, and had the ability through that consciousness to choose by an effort of the will whether he would do the deed. *State v. Windsor*, 5 Harr. 512. And this is good law.

IRRESISTIBLE IMPULSE. "Irresistible impulse" is not "moral insanity," defining "moral insanity" to consist of insanity of the moral system, co-existing with mental sanity. "Moral insanity," as thus defined, has no support,

as we have already seen, either in psychology or law. Nor is "irresistible impulse" convertible with passionate propensity, no matter how strong in persons not insane. In other words, the "irresistible impulse" of the lunatic which confers irresistibility, is essentially distinct from the passion, however violent, of the sane, which does *not* confer irresponsibility. As this distinction is of great importance, we will now notice the reason on which it rests.

Supposing the mind to be sane, and that there is a capacity of judging between right and wrong, there is psychologically no impulse which the law can treat as irresistible. The will is either free, which settles the question at once, or it is directed by the strongest motives, as the necessitarian holds. Now, taking the latter hypothesis, the question arises, supposing the will to follow by necessity the strongest motive, whether it is just to punish the wrong-doer for such necessary act. That it is, is affirmed by the leading representatives of the necessitarian school. "It is said," says Mr. Bain, (*Mental and Moral Science*, London, 1868, p. 404,) "that it would not be right to punish a man unless he were a free agent; a truism, if by freedom is meant only the absence of outward compulsion; *if in any other sense, a piece of absurdity. If it is expedient to place restrictions upon the conduct of sentient beings, and if the threatening of pain operates to arrest such conduct, the case for punishment is made out.* We must justify the institution of law, to begin with, and the tendency of pain to prevent the actions that bring it on, in the next place. * * * Granting these two postulates, punishability (carrying with it, in a well-constituted society, responsibility) is amply vindicated. * * * Withdraw the power of punishing, and there is left no conceivable instrument of moral education. It is true that a good moral discipline is not wholly made up of punishment; the wise and benevolent parent does something, by the methods of allurement and kindness, to form the virtuous dispositions of his child. *Still, we may ask, was ever any human being educated to the sense of right and wrong without the dread of pain accompanying forbidden actions?* It may be affirmed with safety that punishment or retribution, in some form, is one-half of the motive power to virtue in the very best of human beings, while it is more than three-fourths in the mass of mankind." Now, erroneous as is Mr. Bain's position that the primary ground of punishment is prevention to be effected by fear, there can be no question that on the necessitarian hypothesis his reasoning is sound.

Mr. J. S. Mill, in his examination of Sir W. Hamilton's philosophy, supposes the case of a race of men whose hereditary tendencies to mischief are as great and uncontrollable as those of lions and tigers, than which no case brought up by the advocates of the unpunishability of those subject to irresistible propensities could be more strong. Having supposed such men, he asks whether we would not treat them precisely as we would a wild beast, even though we supposed them to act necessarily. The highest theory of fatalism, he infers from this, is not inconsistent with the infliction of penalties on the offender. The question that arises, then, is, is such punishment just? Can we justly punish a man for that which he cannot help? And he argues that we certainly can, if announcing beforehand that such offenders are to be punished;

and supporting the announcement by inflexible and uniform execution, is the way to keep them from committing the obnoxious act. If the end—the prevention of crime—is justifiable, then the necessary steps for the prevention of crime are also justifiable. And despotic as is the assumption that punishment is to be inflicted, not as a matter of justice in obedience to a preannounced law, but as a matter of policy irrespective of deserts, the conclusion legitimately follows from Mr. Mill's premises.

It being, therefore, settled that "irresistible impulse," to constitute a defence, must be that of a person otherwise insane, we proceed to consider the authorities that establish such impulse, under such conditions, as a defence. In doing so it must be, at the outset, conceded that, by the English courts, this defence, as here stated, is rejected. No person, however insane, can, by the law as now (1882) expounded by those courts, be acquitted of a crime if it appear to the satisfaction of the jury that he knew the nature and quality of the act he was doing, or, if he did not know it, if he knew that the act was wrong. But if, as may readily be shown, it is demonstrable that there sometimes is, among insane persons, an "irresistible impulse" to an act co-existing with a knowledge that it was wrong, then comes the question whether lunatics of this stamp are legally punishable for such acts. That they are not, the tendency of American authority is to maintain. And even in England we find Mr. Stephen, in his work on English Criminal Law, (London, 1863, p. 91.)—a work as remarkable for philosophical symmetry as for legal accuracy,—stating (1863) the questions to be, "in popular language, *Was it his act? Could he help it? Did he know it was wrong?*" He goes on further to say: "It would be absurd to deny the possibility that such [irresistible] impulses may occur, or the fact that they have occurred, and have been acted on. Instances are also given in which the impulse was felt, and was resisted. The only question which the existence of such impulses can raise in the administration of criminal justice, is whether the particular impulse in question was irresistible as well as unresisted. *If it were irresistible the person accused is entitled to be acquitted, because the act was not voluntary, and was not, properly, his act. If the impulse was irresistible*, the fact that it proceeded from disease is no excuse at all." See *McFarland's Case*, 8 Abb. N. Y. Pr. (N. S.) 57. In Sir J. Stephen's testimony before the English homicide committee the same view is taken. Whart. Crim. Law, (8th Ed.) § 45.

In Illinois, in 1863, it was declared by the supreme court that a safe and reasonable test would be, that whenever it should appear from the evidence that, at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he should be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. If it be shown the act was the consequence of an insane delusion, and caused by it, and by nothing else, justice and humanity alike demand an acquittal. Sound mind is presumed if the accused is neither an idiot, a lunatic, nor "affected with insanity." If he be insane, sound mind

is wanting, and the crime is not established; therefore, the burden is on the state to establish sanity, and not upon the prisoner to show insanity. See *Fisher v. People*, 23 Ill. 283; *Hopps v. People*, 31 Ill. 394. So, also, Judge Brewster, speaking for the judges of the Philadelphia common pleas, said, in 1868: "The true test in all these cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right and wrong, and the power to adhere to the right and avoid the wrong?" *Com. v. Haskell*, 2 Brewst. 491.

In Indiana a similar view was accepted in 1869. *Stevens v. State*, 31 Ind. 485.

In Ohio insane irresistible impulse is regarded as a defence; *Blackburn v. State*, 23 Ohio St. 146; and such is the view in Minnesota; *State v. Gut*, 13 Minn. 341; and in Kentucky; *Smith v. Com.* 1 Duv. 224. In Iowa, in 1868, the same point was affirmed by the supreme court, Chief Justice Dillon delivering the opinion. The capacity to distinguish right and wrong, it was held, is not in all cases a safe test of criminal responsibility. If a person commit a homicide, knowing it to be wrong, but driven to it by an uncontrollable and irresistible impulse, arising not from natural passion, but from an insane condition of the mind, he is not criminally responsible. *State v. Felter*, 25 Iowa, 67. See, also, *McFarland's Case*, 8 Abb. Pr. (N. S.) 57, and *Mary Harris' Case*, 22 Am. Jour. Ins. 334. To the same effect is a decision of the supreme court of the United States in 1872. *Life Ins. Co. v. Terry*, 15 Wall. 580. See, also, *Blackburn v. State*, 23 Ohio St. 165; *Brown v. Com.* 78 Pa. St. 122; and other cases in Whart. Crim. Law, (8th Ed.) 145.

In North Carolina, on the other hand, it has been ruled that no impulse, however irresistible, is a defence when there is a knowledge of the difference as to the particular act between right and wrong. *State v. Brandon*, 8 Jones, 463. And there is no question that the position that an irresistible impulse can be a defence is inconsistent with the rule laid down in the great body of cases which sustain the "right and wrong" test as an exclusive standard. And even where this test is not so received, irresistible impulse is no defence unless the defendant is proved *aliunde* to be insane.

Thus, in *People v. Coleman*, N. Y. Dec. 1881, Judge Davis charged the jury as follows: "In this state the test of responsibility for criminal acts, where insanity is asserted, is the capacity of the accused to distinguish between right and wrong at the time and with respect to the act which is the subject of inquiry." He further said that the question for the jury to determine is "whether at the time of doing the act the prisoner knew what she was doing and that she was doing a wrong; or, in other words, did she know that she was shooting at the deceased, and that such shooting was a wrongful act?" The judge further said: "No imaginary inspiration to do a personal or private wrong, under a delusion, a belief, that some great public benefit will flow from it, where the nature of the act done and its probable consequences, and that it is in itself wrong, are known to the actor, can amount to that insanity which in law disarms the act of criminality. Under such notions of legal insanity, life, property, and rights, both public and private, would be altogether insecure, and every man who, by brooding over his wrongs, real or imaginary, shall work himself up to an irresistible impulse to avenge himself, or his

friend or his party, can with impunity become a self-elected judge, jury, and executioner in his own case, for the redress of his own injuries or the imaginary wrongs of his friends, his party, or his country. But, happily, that is not the law, and whenever such ideas of insanity are applied to a given case as the law, (as too often they have been,) crime escapes punishment, not through the legal insanity of the accused, but through the emotional insanity of courts and juries."

To the same general effect may be cited *Rex v. Oxford*, 9 C. & P. 525; *Burrow's Case*, 1 Lewin, 238; *Rex v. Goode*, 7 Ad. & El. 536; 67 Hans. Par. Deb. 728; *Bowler's Case*, *Hadfield's Case*, Id. 480; 27 How. St. Tr. 1282; *Rex v. Barton*, 3 Cox, C. C. 275; *Rex v. Oxford*, 5 C. & P. 168; *Rex v. Higginson*, 1 C. & K. 129; *Rex v. Stokes*, 3 C. & K. 185; *Rex v. Layton*, 4 Cox, C. C. 149; *Rex v. Vaughan*, 1 Cox, C. C. 80; *U. S. v. Shults*, 6 McL. 121; *Com. v. Rogers*, 7 Metc. 500; 7 Bost. Law Rep. 449; *State v. Richards*, 39 Conn. 591; *Freeman v. People*, 4 Denio, 9; *Flanagan v. People*, 52 N. Y. 467; *People v. Sprague*, 2 Parker, C. R. 43; *State v. Spencer*, 1 Zabriskie, 196; *Com. v. Mosler*, 4 Barr, 264; *Com. v. Farkin*, 3 Penn. L. J. 480; *Brown v. Com.* 78 Pa. St. 122; *State v. Gardiner*, Wright, (Ohio,) 392; *Vance v. Com.* 2 Virg. C. 132; *McAllister v. State*, 17 Ala. 434; *Dove v. State*, 3 Heisk. 348; *Stuart v. People*, 1 Baxter, 178.

MANAGEMENT OF THE TRIAL. On Judge Cox's management of the trial almost unqualified commendation can be bestowed. In a very intelligent letter from Washington, in the *Independent* of February 9, occurs the following:

"Was there ever before in a tribunal of enlightened people such concentrated and accumulated disgrace and real cause for shame? A vituperative criminal, whose impudence and indecency could be equalled only by his fluency and keenness of perception and repartee; a hissing, jeering, and applauding audience; perpetually wrangling counsel; all three antagonistic forces often talking and fighting at once; with a judge who, to all appearance, was utterly inadequate to manage or control either,—such was the trial of an unprecedented criminal, for an unpardonable crime, which for 10 weeks disgraced this country and made a shameful spectacle for the whole world. Who that day after day listened to loud and vengeful shouts of the prisoner, to the bickering and quarrelling of the lawyers, could believe that this trial could ever mount to a climax that could, at last, simply express dignity and law? Yet out of all this chaos, this disgrace, the supreme moment came. It came when the much-berated, long-suffering, too mild, yet noble judge uttered his final charge, and when, 30 minutes later, the intelligent jury returned, to give out from its united conscience the verdict: 'Guilty as indicted. Thus say we all.'

"Then, not till then, was justice vindicated.

"The charge of Judge Cox was a surprise to all, save the few who knew the real measure of the man. It was a surprise to the prisoner, who, after the long weeks of leniency, forgiveness, and indulgence, which he had abused, under this judge's rulings, fully expected a charge that would move the jury towards his favor. It was a surprise to the spectators, who, witnessing his indulgence, had almost invariably concluded that 'Judge Cox favored Guiteau;' but it was not a surprise to any one who knew Judge Cox.

"And, as so much misunderstanding, misjudgment, and harsh judgment have inevitably spread through the land concerning this gentleman, I will say a few words for him, in simple justice. Into every just judgment of an indi-

vidual must enter some discriminating knowledge of his antecedents, his education, his temperament, his nature. Such elements as enter into the 'make-up' of Judge Cox are rarely seen in any man, north or south, who has achieved success or eminence. Said one who knows him well, 'I have never seen any man really eminent who had so little self-consciousness.' 'Judge Cox is the most unpretentious man I ever knew. He assumes nothing.'

"Judge Walter Cox was born in Georgetown, and is by birth, association, and training a real son of the District of Columbia. Inheriting a large fortune from his father, he had all the incentives to idleness usually born of opulence; but, though he lives in great elegance, and entertains with large hospitality, he has been all his life one of the hardest of workers. Standing in the foremost rank as a lawyer, he has been for years at the head of the law school of Columbia University, Washington. In addition to a pressing law practice, three evenings of the week, for many years, have found him in his place as the instructor of the intelligent, and, in many cases, hard-worked young men, who, with other employments by day, studied law with Judge Cox of nights. * * *

"Judge Cox is a slight, delicate-looking man, whose strong features and fine head indicate a mentality more potent than any mere physical force could express. He is somewhat bald, has mild blue eyes, a Roman nose, and an expression entirely benevolent. Said a friend: 'I cannot see how a man can amount to so much and assert himself so little.' This was the quality that brought down upon him so many anathemas during the Guiteau trial. His is not the material energy or enginery that vociferates, gesticulates, commands. Guiteau, who is an acute and nervous brute, cared no more for Judge Cox's gentle cry of 'Silence!' than he did for the fly he brushed from his nose. But the moment came when he cared. When Judge Cox's wise mind, clear sight, and just statement were set upon the facts of his awful crime, the criminal knew he had reached at last his moment of doom, and he quaked as utterly as if the vociferous insolence and insults with which he had filled every hour of his disgraceful presence in court had never been."

This, from what I know of Judge Cox, I believe to be true; and I may add that there was a heroism in his management of the case which should mark an era in judicial history. I do not, of course, appeal, by way of comparison, to the conduct of English judges in the seventeenth century, or even to that of French judges of the present day. Yet, in view of recent English criticisms of the Guiteau trial, it is well to look at some of the more conspicuous English prosecutions, and inquire whether the example they set is not one which it was right to reject.

When the few surviving regicides were brought to trial on the restoration of Charles II., they were overwhelmed with obloquy by the court as well as from the attorney general; they were not permitted to have counsel; when they attempted to argue in extenuation the political conditions of the times they were crushed under a storm of coarse abuse. In the later political trials under Charles II. and James II. the judges interfered to degrade, insult, and convict the prisoners with a savage and vulgar ferocity which Guiteau alone, were he now put on the bench, could exceed. I do not, of course, turn to such scenes as these, but I would take, by way of comparison, Lord Chief Justice Cockburn's course in the Tichbourne prosecution. As to that prosecution two remarks may be premised: In the first place, the claimant's guilt was very far from being as plain as that of Guiteau; in the second place, exasperating as was the claimant, the annoyance he gave the court was but slight

compared to that given by Guiteau. Vulgar and insolent as the claimant was, his vulgarity and insolence were trivial compared to those which Guiteau exhibited to court as well as to counsel. Yet observe, in this respect, the contrast: Chief Justice Cockburn sat with a full bench of associates, in all the splendors of his robes and of his high state, in the full consciousness of gifts of sarcasm and of invective such as few orators ever possessed, and of gifts of cross-examination and of advocacy such as scarcely any lawyer of his day could equal. These immense powers of sarcasm and of invective, during a trial which lasted a month, he did not shrink from pouring on the claimant's head. The claimant's coarse wit was turned against him by wit which, if not coarse, was at least domineering. The claimant's audacity was met by stern denunciations and fierce rebuke, which showed that the judge believed him to be guilty and determined to destroy his defence. The trial was a personal struggle between the defendant and the chief justice. The defendant, with all his cunning and doggedness was overmatched; and yet, when the trial was closed by a charge of the chief justice, which now occupies two large volumes, and which is the most consummate piece of judicial advocacy in existence, it was felt that although the defendant was probably guilty, he had not been fairly tried. Far different, however, is the feeling in respect to Guiteau's case. The temptation to Judge Cox to deal impatiently with Guiteau, let it be remembered, was far greater than was the temptation to Chief Justice Cockburn to deal impatiently with the claimant. The claimant's impudence was slight compared with that of Guiteau. The claimant had a defence on the merits; Guiteau had none. The claimant had a respectable body of adherents. Guiteau, with the single exception of a brother-in-law espousing his cause, from motives most honorable, but purely exceptional, had not a friend or sympathizer, but was the object of the execrations of the entire population of the United States. If ever a judge could have been naturally tempted to throw his personal force against a prisoner it was in this case of Guiteau. If ever personal disgust and contempt of a prisoner could have been naturally expected to enter into a judge's heart, it was on Guiteau's trial. So strong was this feeling, that, with a very few exceptions, the public press became impatient, when day after day Guiteau was permitted to pursue his course of unchecked profanity and indecency in the management of his own defence; and it was more than once stated that articles of impeachment were preparing in the house of representatives to test the competency of a judge who had permitted such outrages as those which Judge Cox was alleged to have permitted in the pending trial. The case, it was supposed, was aggravated by the fact that there was a reported case in which a federal judge of high authority had held that where a defendant on trial behaves so boisterously as to prevent the decent progress of the procedure, he can be removed from the court-room and the case go on in his absence. *U. S. v. Davis*, 6 Blatchf. 464. In the eighth edition of my book on Criminal Practice and Pleading, I said that "unless such a check be applied, the defendant, by violent and turbulent conduct, could at any time either bring his trial to an end, or compel its extension, under circumstances destructive of public decorum." This, I still hold; but I think that in Guiteau's case it was wise in Judge Cox not to use this extreme prerogative, however great the temptation was. In the first plea

the defence was *insanity*; and of insanity a man's demeanor on trial is one of the most important ingredients of proof. Had Guiteau been sent to his cell, and had the trial been pushed on in his absence, the jury might have hesitated to find a verdict of conviction, and even had there been a conviction there would have been a general feeling of discomfort, if not of disapproval. The case, in fact, would have gone on without either defendant or defendant's counsel, for the latter, under the circumstances, would readily have raised the opportunity thus given them of affording their client the only substantial aid in their power. A former noted trial in a federal court would have advised them how great this aid might have been. On the second trial of John Fries, in the circuit court of Philadelphia in 1800, Judge Chase, then presiding in that court, undertook at the opening of the case, before hearing argument from counsel, to declare that the court had determined to rule certain points as the law of treason in such a way as to reduce the questions of law left open for discussion on the trial. There was nothing in this very different from the practice that exists of a judge charging a grand jury on points of law about to arise on a trial before a petit jury; and as a matter of fact the points of law Judge Chase laid down were the conclusions adopted by the court on a former trial of the same defendant, on which a new trial had been granted on grounds which left the rulings of the court untouched. It was, however, indiscreet in Judge Chase to say, at the outset of the second trial, "These points we consider settled." He should have said, "We will hear argument on these points if desired." But he took the former course, and Mr. A. J. Dallas and Mr. Lewis, Fries' counsel, lawyers of great eminence, seized with alacrity the only way they had of saving their client by withdrawing from the case. Judge Chase saw at once his blunder, and implored them to come back, and offered to review the whole question. Back, however, they would not come, and they advised Fries to decline to accept other counsel, which he cheerfully did. He was convicted, almost in spite of Judge Chase's efforts; for that able and generous, but impetuous judge, whatever had been his former feelings, had now no desire to obtain the conviction of a man without counsel. Such a verdict, however, could not stand. Fries was pardoned by Mr. Adams, and Judge Chase was impeached by the house of representatives for this and other irregularities, and barely escaped conviction. It was well that he was not convicted, for his error was, after all, an error of judgment; and it was well that Fries was pardoned, since his execution under the circumstances, if not unjust, would have been unwise. And, although, had Guiteau been put out of the court-room, and a conviction ensued, his counsel having withdrawn, it is not likely that a pardon would have been granted, yet there would be a general feeling that his case had not been fully heard. The trial would have been looked back upon with sadness and disquiet. It cannot be so looked back upon now.

In the second place, aside from the technical question just discussed, there can be now no question that giving Guiteau full liberty in the court-room greatly conduced not only to the promptness and early unanimity of the action of the jury, but to the universal approval with which that verdict has been met. I confess that when the prosecution opened I had much doubt whether a conviction could be secured; and I believe that the general sentiment then

was that the case was on the border-line, and that the jury could not be expected to agree. This feeling, however, was gradually dispelled by Guiteau's course during the trial. Undoubtedly he showed great vanity and great ignorance, so far as the higher conditions of knowledge are concerned. But he showed abundantly that he acted in the tragic homicide perpetrated by him with a motive, which, however preposterous and villainous, was nevertheless as sane as are the motives of other criminals who take human life to gratify personal or social or political revenge, and with a full knowledge of the unlawfulness of his act. He proved on the trial that he was as sane as are the greater body of ruffians by whom life is taken; and he proved also that if the defence of insanity was good in his case, there are few cases of atrocious crimes in which it could not be sustained. Had he been removed from the court-room, or "gagged," as was proposed, this condition would not have existed. Even if convicted, there would have been many who would have felt that the case was still one of doubt, and there would have been few who would have regarded the conviction and execution with entire approval.

The only points about Judge Cox's management of the trial which I question are the following: (1) The order in the court-room, so far as I can judge from the newspaper reports, might have been better preserved. It seems to me that marks of approval or disapproval among mere visitors could have been suppressed; and if this could not have been done, the court-room could have been cleared. This could have been done without the suspicion of invading the defendant's constitutional rights. (2) The trial might have been more compressed. To adjourn at 3 o'clock, or earlier if counsel desire it, is a great provocative to diffuseness; and the vanity of a defendant like Guiteau is stimulated by the assignment of so long a period for display.

More serious criticisms may be made on the conduct of the prosecution. It is difficult to understand why the case of the prosecution should have included proof of the difference between "stalwart" and "half-breed" republicans, and why a topic of this class, irrelevant certainly at that stage, should have been invoked by the prosecution. The ordinary course would have been to have proved the killing, and then rested. If the defendant wanted to show that he was in a state of insane political excitement about "stalwartism" and "half-breedism," then it was incumbent on him to show in what this excitement consisted. But this was for the defendant. For the prosecution to raise at the outset the question, not only was irregular as a matter of procedure, but introduced into the case a political feature which could not afterwards be got rid of, and which was the cause of much waste of time and of many disreputable interludes. Nor can the speeches of Mr. Porter be regarded with unmixed approval. Undoubtedly his cross-examination was judicious, so far as it drew Guiteau fully out. But his closing speech would have been far more effective had he refused to reply to Guiteau's interruptions. Cut from the speech its argumentative parts, and there remains a large mass of vituperative retorts between prosecution and defendant—retorts in which both parties employed the most virulent terms which the English language contains. In a review of Twiss' life of Lord Eldon by Mr. Sergeant Talfourd, himself an eminent lawyer, it is said that Lord Eldon, then Sir John Scott, when conducting state prosecution, "maintained a courtesy of demeanor which won the

respect of his most ardent opponents." * * * "He endured the most anxious labor to prevent" the penalties of the law "falling on one who, however guilty, was not subjected to its infliction by the plainest construction of the law." I have in my possession briefs of counsel in Fries' case, in which Mr. Rawle, United States district attorney, conducted the prosecutions, and the notes of other criminal prosecutions, in Gen. Washington's administration, in which Mr. Randolph and Mr. Bradford prosecuted as attorney general. In these notes, and in the printed reports of these cases, nothing is more remarkable than the scrupulous semi-judicial dignity of the district attorney and of the attorney general; and the same remark may be made as to the conduct of Mr. Wirt, during his long incumbency of the attorney general's chair, in the management of the many cases in which he prosecuted. It is questionable whether the district attorney or the attorney general, as the case may be, should not, in all cases not *quasi* civil, take exclusive control of the prosecution. But however this may be, the prosecution should be conducted with dignity, and without resort to personal altercation with and vituperation of a prisoner, no matter how vile he may be. And this is for two reasons. In the first place, what may be done in one case may be done in another, and all criminal trials would become scenes of disgraceful uproar and Billingsgate abuse. Men of dignity and delicacy would be excluded from criminal courts if these be the weapons to be used, and public justice would suffer a serious shock in the turmoil in which trials would be thrown. Secondly, the effect of altercations of this kind is in the prisoner's favor, and an unjust acquittal may be produced from a feeling of reaction against an indecorous prosecution.

The only question of doubt in the Guiteau case is that of jurisdiction. So far as concerns the reason of the question, apart from authority, Judge Cox's ruling cannot be assailed. Whether, however, the weight of authority is not against that ruling, is a point for the appellate court to determine.

FRANCIS WHARTON.

NOTE. The charge to the jury, delivered by Judge Cox in the celebrated Guiteau case, is a masterly exposition of the law governing the case. That it is borne out by the authorities on each point enunciated will be readily seen. As to the constitutional rights of the accused, he certainly did enjoy the right to a speedy and public trial by an impartial jury; and he was informed of the nature and cause of the accusation; was confronted with the witnesses against him, and had compulsory process for obtaining witnesses in his favor, and at the expense of the government; and he not only had the right to have the assistance of counsel, but also exercised the right to appear for himself as counsel. It was the duty of the court to lay down the law in this case, as the jury are not constituted judges of the law in criminal cases. *Pierce v. State*, 5 How. 504; *U. S. v. Morris*, 1 Curt. 23; *U. S. v. Shire*, Bald. 510; *U. S. v. Battiste*, 2 Sumn. 243.

To constitute malice in law, hatred, ill-will, and the like need not exist. *U. S. v. Ross*, 1 Gall. 624; *People v. Taylor*, 36 Cal. 255; *Stiles v. State*, 57 Ga. 183; *State v. Hays*, 23 Mo. 287; *Revel v. State*, 26 Ga. 280.

To constitute murder in the first degree the act should not only be wilful,

premeditated, malicious, and without legal justification, but it must have been connected with the former intention to take life; a fixed design that the act shall result in the death of the party assaulted; a fully formed and conscious design to kill, and with a weapon prepared for the purpose; and deliberation may be inferred from deliberately procuring the weapon for the avowed purpose of killing. *Com. v. Murray*, 2 Ashm. 41; *Com. v. Williams*, Id. 69; *Kennedy v. Com.* 14 Bush, 340; *Swan v. State*, 4 Humph. 136; *Riley v. State*, 9 Humph. 657; *Com. v. Drum*, 58 Pa. St. 1; *Lanahan v. Com.* 84 Pa. St. 80; *King v. Com.* 2 Va. Cas. 78.

As to the question of insanity. Every defendant is presumed in law to be sane, and the burden of proof is on him to prove his insanity at the time of the commission of the act, subject only to the benefit of a reasonable doubt. *U. S. v. Lancaster*, 7 Biss. 440; *Ogletree v. State*, 28 Ala. 693; *U. S. v. McClare*, 17 Law Rep. 439; *Com. v. Hawkins*, 3 Gray, 463; *Com. v. Eddy*, 7 Gray, 583; *Com. v. Rogers*, 7 Met. 500; *Com. v. York*, 9 Met. 93; *State v. Jones*, 50 N. H. 369; *State v. Bartlett*, 43 N. H. 224; *State v. Pike*, 49 N. H. 399; *People v. McCann*, 16 N. Y. 58; *Bond v. State*, 23 Ohio St. 349; *People v. Robinson*, 1 Park. C. R. 649.

The criminal actor must be of sane mind, as an act does not make a man guilty unless his mind is guilty, and an insane person cannot, in the legal sense, have any intent. *Long v. State*, 38 Ga. 507.

Partial insanity can be an excuse only when it deprives the party of his reason in regard to the act charged. *State v. Lawrence*, 57 Me. 74; *State v. Huting*, 21 Mo. 464; *Bovard v. State*, 30 Miss. 600; *Com. v. Mosler*, 4 Pa. St. 264; *State v. Gut*, 13 Minn. 341. And it will not excuse if he had reason sufficient to distinguish between right and wrong as to the particular act. *Bovard v. State*, 30 Miss. 600.

A person may be sane and insane at different times, and insane and irresponsible as to one subject and sane and responsible as to another. *Hall v. Unger*, 2 Abb. U. S. 512; *Freeman v. People*, 4 Denio, 9; *Dew v. Clark*, 3 Ad. & Ec. Rep. 79. So that if the defendant was sane as to the crime committed, his insanity on other topics will not save him. *Bovard v. State*, 30 Miss. 600; *State v. Huting*, 21 Mo. 664; *Com. v. Mosler*, 4 Pa. St. 266. Or if he commit a crime in some other matter not connected with the *delusion*, such delusion constitutes no defence. *State v. Gut*, 13 Minn. 341; *State v. Huting*, 21 Mo. 464; *Bovard v. State*, 30 Miss. 600; *State v. Geddis*, 42 Iowa, 264; *State v. Mewherter*, 46 Iowa, 88; *Com. v. Mosler*, 4 Pa. St. 264.

"The true test of responsibility lies in the word 'power'—has the defendant the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong, and the power to govern the mind, body, and estate? And it is sufficient if power to do so is shown to have existed in reference to the particular act. If he was under such defect of reason from disease of mind as not to know the quality of the act he was doing, or was under such delusion as not to understand the nature of his act, or had not sufficient memory or reason to know he was doing wrong, then he was not responsible; but if he knew what he was doing, and that the act was forbidden by law, and took precautions to accomplish his purpose, and had power of mind enough

to know what he was doing at the time, then he is responsible, for it is conscious knowledge coupled with the act which constitutes crime." See *Desty*, Amer. Crim. L. § 23b, p. 62, and cases cited.

The prisoner himself endeavored to impress the jury with the idea that he had acted under an insane delusion that he had been commissioned by the Deity to commit the act, but he failed in his effort to so impress the jury. "Monomania is insanity only on a particular subject and with a single delusion; the mind, in other respects retaining its intellectual powers, has imbibed some single notion contrary to common sense or experience. It excuses only when it deprives the party of his reason in regard to the act charged to which it must immediately relate, and the delusion must be mental, not moral, and the act must be done *bona fide* and without malice, and not from motives of revenge for supposed injuries. If the delusion is only partial, the person is equally liable with a person of sound mind; or, if the delusion was an opinion that ordinary reason might have produced, it will not excuse from crime." *Desty*, Amer. Crim. L. § 25d, and cases cited.

Moral insanity co-existing with mental insanity has no foundation in law, and will not furnish an excuse from punishment for crime if he is conscious he is doing wrong, whether he has power over his conduct or not; so a blunted moral sense sufficient to free the mind from remorse is not insanity. See many decisions cited in *Desty*, Amer. Crim. L. § 25e, p. 69. The vagaries of the human mind shaped by religious opinions, superstitious belief, or inspirational rhapsodies, however they may affect the moral character, are in no sense to be considered as delusions constituting an insane condition of the mind, so as to excuse from punishment for crime.

Insanity to be an excuse from punishment should be such as dethrones the reason, overpowers the will, and creates an irresistible impulse to perform the act, while it deprives the party of the power to judge between right and wrong as to the particular act committed, as is established by abundant authority.

It is to be hoped that the charge of Judge Cox, its effect, and the verdict rendered, will exercise a salutary influence in the administration of justice in the future in cases of premeditated homicide, and that the long conflict of medical science, speculative at most, with its fine distinctions of mental and moral aberration, transmission by descent, physical convolutions of the brain, etc., etc., against legal science, upon the subject of human responsibility, will speedily approach an end, and criminals be subject to a reasonable legal test of responsibility for crime.—[Ed.]

NEW YORK SILK MANUF'G CO. v. SECOND NAT. BANK OF PATERSON.

(Circuit Court, D. New Jersey. February 13, 1882.)

1. REMOVAL OF CAUSES—JURISDICTION, WHEN ATTACHES.

Where a removal is authorized, the parties being citizens of different states, the matter in dispute exceeds \$500, exclusive of costs, the petition is in due form, and a bond executed and filed, jurisdiction ceases in the state court and attaches here, and all further proceedings in the state court are *coram non judice*.

2. SAME—JURISDICTION OVER INCIDENTS.

The jurisdictional limitation to \$500 has reference to the sum in dispute between the plaintiff and defendant, and the right of applying creditors to come in and have their claims adjusted and allowed is a mere incident over which this court will necessarily exercise jurisdiction.

On Motion to Remand.

John W. Taylor, for creditors.

George S. Hastings, for defendant in attachment.

Preston Stevenson, for plaintiff in attachment.

NIXON, D. J. Two writs of foreign attachment were issued out of the circuit court of the county of Hudson, in favor of the Second National Bank of Paterson, against the New York Silk Manufacturing Company, a foreign corporation owning property in New Jersey,—the first on the third of October, and the second on the twenty-ninth of October, 1881,—under which the sheriff of the county of Hudson attached and made an inventory of the property of the defendant. Various motions were made in the circuit court to dissolve these attachments, to which it is only necessary to refer generally, and all of which were denied by the court. Pending an application for the appointment of an auditor for the sale of the attached property, petitions were presented showing proper cases for removal to this court, under the act of March 3, 1875, accompanied by a bond duly executed and filed, and followed by appearance to the attachment suits in behalf of the defendant corporation; no objections seem to have been raised to the sufficiency of the petitions and bonds. The attorney for the attaching creditor procured from the clerk of the circuit court of the county of Hudson properly-certified copies of the records of the cases, and caused the same to be filed in this court on the fifteenth of December, 1881. A motion is now made by the party which petitioned for the removal to this court, to remand the cases again to the state court. The notice of the application is signed by "James B. Vredenburg, attorney for the defendant," and

states that the motion is founded "upon all the proceedings had in the cases, and upon the annexed rule." Appended to the notice appears a certified copy of a rule made by the judge of the state court, on the thirty-first of December, 1881, authorizing the defendant corporation to withdraw the appearance to the attachment suits as improvidently and irregularly entered. I have considered the arguments of counsel, and examined the case with care, and find nothing in the proceedings or in the order of the state judge, setting aside the appearance of the defendant to the attachment, which would justify me in granting this motion.

The suit is clearly within the class of cases where removal is authorized by the acts of congress. The parties are citizens of different states. The matter in dispute exceeds \$500, exclusive of costs. The petition is in due form, and no complaint has been made against the validity or security of the bond. The petition was signed by the defendant and presented to the state court, and a bond executed and filed for no other purpose than to transfer the case from that court to this, and jurisdiction ceased there and attached here as soon as these steps were taken. This has been the general tendency and result of the judicial construction of the removal statutes, both in the state courts and in the courts of the United States, for some years past. Judge Dillon, in his excellent treatise on Removal of Causes, § 15, says:

"If the case be within the act of congress and the petition is in due form, accompanied with the offer of the required surety or bond, the statute is that the state court must accept the surety, or the petition and the bond, and proceed no further in the case. Under such circumstances the state court has no power to refuse the removal, and can do nothing to affect the right, and its rightful jurisdiction ceases *eo instanti*. No order for the removal is necessary, and every subsequent exercise of jurisdiction by the state court, including its judgment, if one is rendered, is erroneous. And if the right of removal has once been perfect, it cannot be taken away by subsequent amendment in the state or federal court," etc.

The last utterance of the supreme court on this subject, to which my attention has been called, is found in the case of *Baltimore & Ohio R. Co. v. Koontz*. The opinion of the court was delivered by the chief justice on October 31, 1881, and is reported in the Albany Law Journal of December 17, 1881. It is there distinctly held that the jurisdiction changes when the removal is demanded in proper form; that it is transferred from the state to the federal court; and that all questions relating to the fact of removal are to be determined by the last-named court.

It necessarily results from this that all proceedings in the state court, after a due demand for removal by either party, are *coram non judice*. Its jurisdiction is lost, and no order by that court—I say it with great personal respect for the learned judge who made the order in this case—can be invoked as ground for an application to remand. The suggestion was made at the hearing that if I could not find grounds for remanding the case, on the proceedings or action of the state court, I could at least authorize the defendants in this court to withdraw the appearance heretofore entered in the Hudson circuit, and thus allow the outside creditors to come in and share in the proceeds of the attached property. But there are two difficulties in the way: the first is that all the presumptions in the case lead to the conclusion that the appearance was authorized in effect if not in express terms; the second is that the attaching creditors have acquired an exclusive lien upon the property under the attachment act of the state of New Jersey, of which this court has no right, if it had the disposition to deprive them.

The provisions of sections 14, 35, 38, and 39 of the "Act for the relief of creditors against absconding and absent debtors," (Rev. St. N. J. 42,) show that when the defendant in attachment enters an appearance to the suit without the execution of the bond prescribed by the thirty-third section of the act, the property seized by virtue of the writ remains in the custody of the officer and under the control of the court, and is held for the satisfaction of the claims of the plaintiff in attachment, and of such persons as, before the appearance, have entered rules in the minutes of the court to be admitted as creditors under such attachment. All other creditors are then excluded from participating in the proceeds of the *res* until the plaintiff and such applying creditors are paid in full.

This may seem inequitable and unjust to other meritorious creditors, who have for any reasons refrained from becoming parties to the proceedings, but it is the reward which the law gives to the diligent. When the defendant corporation signed the petition for removal, and executed the bond, and gave instructions to the attorney to take the necessary steps to effect the removal of the suit into this court, it was probably not aware of the legal consequences of the act, and had no thought of depriving other creditors, who had not become parties to the attachment proceedings, of sharing in the *pro rata* distribution of the assets. In other words, a mistake in law was made; but I do not understand that I have any power to correct mistakes in law, if by so doing I take away from other innocent parties any

rights which they had acquired by such mistakes. It was further urged upon the argument that there was a practical difficulty arising from the peculiar features of the New Jersey act in holding that this court had jurisdiction over a suit begun by attachment in a state tribunal. The thirty-eighth section makes it lawful for any defendant in attachment to enter an appearance to the suit of the plaintiff, or of any applying creditor, without giving bond for the return of the property; and after such appearance to suit or suits the plaintiff and creditors shall proceed in all respects as if commenced by summons. The difficulty, earnestly pressed, was that some of the applying creditors had entered a rule for claims for less than \$500, and that there was no power in this court to exercise jurisdiction in a controversy between parties in a removal case where the sum in dispute was less than that amount. No question of that kind has yet appeared in the case, and it will be time enough to meet it when it arises. I have no hesitation, however, to anticipate it by saying that the jurisdictional limitation of the statute to \$500 has reference to the sum in dispute between the plaintiff in attachment and the defendant; that the right of applying creditors to come in and to have their claims adjusted and allowed is a mere incident to the principal suit, and that the court, having acquired jurisdiction over the principal suit, necessarily exercises it over the incident.

The motion to remand is refused.

An application is pending for the appointment of an auditor, and for the sale of the property as perishable, under the provisions of the thirty-ninth section of the New Jersey act concerning attachments. The sheriff of the county of Hudson holds the goods and chattels levied on under the writ of attachment, and I perceive no reason why an order should not be granted appointing him auditor, and directing him to sell the property according to law.

BENEDICT v. WILLIAMS and another.*

(Circuit Court, S. D. New York. February 2, 1882.)

1. PRIVACY OF CONTRACT—ASSIGNEE OF CHOSE IN ACTION.

Where defendants W. and K., citizens of different states, had entered into a contract, by the terms of which the latter was to conduct certain litigation on behalf of the former, and to receive part of the avails thereof for so doing, and thereafter K. had entered into a contract with M. to assist in the conduct of such litigation for a share of such avails, with the knowledge of W., and M. had assigned his share of such avails to the orator, B., *held*, that there was sufficient privity of contract to maintain the suit against K. as his trustee, and against W. as a debtor to his trustee for him.

2. REMOVAL OF CAUSE—DISTINCTIONS BETWEEN LEGAL AND EQUITABLE PROCEDURE.

Where an action commenced in a state court, in which the distinctions between legal and equitable procedure are done away with, is removed to a circuit court of the United States, it is removed to that side of the court where the appropriate relief, if due, can be obtained.

In Equity. On demurrer to bill.

William A. Beach, for plaintiff.

Edward M. Shepard, for defendant.

WHEELER, D. J. This cause has been heard on demurrer to the bill. It was commenced in the state court, and removed to this court. The bill shows that the defendant Williams, a citizen of Connecticut, made a contract with the defendant Kernochan, a citizen of Massachusetts, by the terms of which the latter was to conduct litigation in behalf of the former against the Kansas Pacific Railway Company, as counsel, and to receive one-fourth part of avails thereof for so doing; that by a contract between Kernochan and Edwin R. Meade and Henry E. Knox the latter two were to assist in the conduct of the litigation, and to share equally with the former in the one-fourth part of the avails; that the litigation was conducted by them with the knowledge of Williams, and proceeded until the sum of \$27,500 was received from it as the avails of it, by him; that Meade sold and assigned his share of these avails to the orator, a citizen of New York; that Knox has been fully settled with, and that Meade's share has not been paid over.

The principal grounds of demurrer assigned are that there was no privity of contract between either Williams and Meade or Williams and the orator; that Williams is only liable to Kernochan, who may be liable over to Meade or to the orator; and that the orator's remedy, if he has any, is at law. The want of privity relied upon, how-

*Reported by S. Nelson White, Esq., of the New York bar.

ever, is not material. It may be that the orator had only to pay Kernochan as he agreed to, but, if so, he has not paid to Kernochan Meade's share. That share, if payable to Kernochan, was payable to him for Meade, and Meade would have the right to proceed for it against both; against Kernochan as his trustee, and against Williams as a debtor to his trustee for him. This right he could sell and assign, as the bill alleges he did sell and assign it to the orator; and when so sold and assigned to the orator, he became vested with the right also in some manner to enforce it.

It is understood that the distinctions between legal and equitable procedure are done away with in the state courts, from which the case was removed; and that there the remedy is to be sought by the real owner of a cause of action in his own name. In these courts these distinctions are kept up, although the proceedings at law conform to those of the courts of the state.

At common law a mere chose in action was not assignable at all, although it was assignable in equity, and hence an assignee of a chose in action could not maintain an action at law upon it in his own name, but could in the name of the assignor for his own benefit, or he could proceed in equity to recover it, and, if he did, must proceed in his own name. The orator took the only mode that was open to him in the state court. Had the proceedings remained there his rights would have been wrought out by the appropriate methods there provided. But when the proceedings were removed into this court, they were neither removed from a court of law, or the law side of a court, to the law side of this court, nor from a court of equity, or from the equity side of a court to the equity side of this court; but they were removed from that court as it was, where remedies are administered without this distinction, to this court, where this distinction is observed. And the removal was necessarily to that side of this court, where the appropriate relief, if due, could be obtained. He is merely the assignee of a chose in action, which accrued to Meade, or to Kernochan for Meade. The proceedings are in his own name, and he can go forward with such proceedings only on the equity side of the court. His right is a purely equitable one, and strictly cognizable in his own name in a court of equity only, or only where equitable remedies are administered, and the remedy is none the less equitable because it might not be so classed in the state court.

The demurrers are overruled, with leave to the defendant to answer over within 30 days on payment of costs of demurrer.

**SOUTHERN EXPRESS Co. v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN
Ry. Co.***

(Circuit Court, E. D. Missouri.)

SAME v. MEMPHIS & LITTLE ROCK R. Co.

(Circuit Court, E. D. Arkansas.)

DINSMORE, President, etc., v. MISSOURI, KANSAS & TEXAS Ry. Co.

(Circuit Court, D. Kansas.)

SAME v. ATCHISON, TOPEKA & SANTA FE R. Co.

(Circuit Court, D. Kansas.)

SAME v. DENVER & RIO GRANDE R. Co.

(Circuit Court, D. Colorado. February 21, 1882.)

1. EXPRESS BUSINESS DEFINED.

The express business is a branch of the carrying trade, the object of which is to carry small and valuable packages rapidly and safely.

2. COMMON CARRIERS—RAILROAD COMPANIES NOT ENTITLED TO OPEN EXPRESS MATTER.

A railroad company has no right to open and inspect packages conveyed over its road which are in charge of an express company.

3. SAME—EXPRESS COMPANIES ENTITLED TO DO BUSINESS ON RAILROADS—RAILROAD COMPANIES BOUND TO FURNISH PROPER FACILITIES—DISCRIMINATION.

Railroad companies are bound, as common carriers, to allow express companies to do business on their roads, and to provide such conveyances, by special cars or otherwise, attached to their trains, as are required for the safe and proper transportation of express matter, and they are bound to extend the use of such facilities on equal terms to all who are engaged in the express business.

4. SAME—RATES OF COMPENSATION.

Railroad companies are entitled to fair and reasonable rates of compensation.

5. SAME—HOW FIXED WHERE PARTIES DISAGREE.

Where rates of compensation cannot be agreed upon, the question of what rates are fair and reasonable is for the courts to decide.

6. SAME—CANNOT BE FIXED BY RAILROAD COMPANY.

A railroad company cannot lawfully fix upon an absolute rate of compensation and insist upon being paid by express companies in advance or at the end of each trip.

7. SAME—WHERE THERE HAS BEEN NO PREVIOUS ARRANGEMENT AS TO RATES.

Where no previous arrangement has existed, the court may devise a mode of compensation to be paid as the business progresses, with power of final revision.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

8. SAME—WHERE A PREVIOUS ARRANGEMENT HAS EXISTED.

Courts may assume that rates of compensation which have existed between such companies are *prima facie* reasonable and just, and may require parties to conform to them as their business progresses, with the right on either side to keep and present an account of their business to the court at stated intervals, and claim an addition to or rebate from the amount so paid.

9. SAME—RAILROAD COMPANIES ENTITLED TO SECURITY.

In such cases the railroad company may require a bond from the express company in advance to secure the payment of any amount which may thereafter be found to be due.

10. SAME—PROVISIONS OF THE CONSTITUTIONS AND STATUTES OF MISSOURI AND ARKANSAS.

Statutory and constitutional provisions establishing maximum rates for transportation of passengers and freight on railroads, and forbidding discrimination in charges or facilities in transportation between transportation companies and individuals, do not present any obstacles to the enforcement of the rights of express companies in the manner above indicated.

In Equity.

In the case of the *Southern Express Co. v. St. Louis, Iron Mountain & Southern Ry. Co.* the plaintiff avers, in substance, that it is a corporation organized under the laws of Georgia, and has for a long time been engaged in doing an express business; that prior to the eleventh of May, 1880, it had been doing business as an express company, on the defendant's road, under a contract which the defendant was at liberty to rescind; that on the eleventh day of May, 1880, the defendant, through its president, notified the complainant by letter that after the twenty-sixth inst. it could not do business over defendant's road; that the plaintiff is lawfully entitled to demand and to receive the same facilities of transportation on said road as may be accorded by defendant to itself, and that it is entitled to deductions for accessorial service.

The bill concludes with the following prayers:

(1) That during the pendency of the suit the defendant may be restrained from interfering with the facilities now enjoyed by the Southern Express Company, now accorded it; from interfering with its messengers; from refusing to receive and transport, in the same manner as defendant is now doing, the express matter and messengers of the Southern Express Company, or interfering with its business or present relations with defendant in any manner whatever, so long as the express company is willing and ready to pay according to all legal rates therefor.

(2) That if, during the pendency of the suit, any dispute should arise between the parties as to what is reasonable compensation for transportation, the complainant may be permitted to bring the matter before the court for its decision.

(3) That defendant may be required to transport the express matter, safes

and messengers of the Southern Express Company by the same trains, and to the same accommodation, as it may transport its own express matter; that it be required to transport express matter for statutory tolls and compensation, as provided by law; that defendant may be required to make a reasonable rebate or reduction from its charges to the Southern Express Company, to be fixed by decree of court, by reason of its performance of accessorial service as specified.

(4) That a permanent injunction may issue to the same purport and effect as is prayed in regard to a preliminary injunction.

The defendant, in its answer, denies the material allegations of the bill, and avers:

That since the first of June, A. D. 1880, it has formed and organized an express department of its road, and has been and is now receiving and transporting over its lines, and delivering, freight commonly known as express freight, as it has a right to do; that the express business is a legitimate business of defendant; that it can serve the public without the intervention of the Southern Express Company, and can serve it as well, and that it is unjust to the stockholders of the company to permit a third party to make use of the property of defendant and the services of its employees to reap the profit for the transportation of freight which belongs to it; that the compensation it has received from the plaintiff for transportation over its lines during the term of the existence of the contract was inadequate for the service performed; that the conduct of complainant in the management of its business, its intervention between defendants and its customers, its taking a large amount of freight which was not properly express freight; its continued violation of its contracts under which it was permitted to do an express business, and its concealment and withholding true and correct reports of the weights of express freights transported over defendant's line of road, occasioned great damage to defendant, and compelled the termination of said contract; that as a common carrier it owes to complainant no other duty than to any other person desiring to transport freight over its road; that defendant does not claim the right to exclude the transportation of express matter of complainant over its road, and has always been willing, and is now willing, to transport any express matter in spaces in its cars selected by itself, and under the supervision, care, and control of its own employees, and denies that complainant has any right to have allotted to itself any particular space in defendant's cars, or to permit its messengers to take charge of its express freight.

The plaintiff filed a general replication in the usual form. Substantially the same points of law were raised by the pleadings in the other cases. A preliminary injunction was granted in the case of the *Southern Express Co. v. St. L., I. M. & S. Ry. Co.*, November 6, 1880. The case came up for final hearing before MILLER and McCARY, JJ., at St. Louis, Missouri, on the seventh of February, A. D. 1882. Attorneys for the parties to all the above-entitled causes were present, and in pursuance of an agreement between them all of said causes were

argued and submitted together, so far as the questions of law therein involved were concerned.

Glover & Shepley, S. M. Breckenridge, and F. E. Whitfield, for the plaintiff in the case of the *Southern Express Company v. St. Louis, Iron Mountain & Southern Railway Company*.

F. E. Whitfield, for the plaintiff in the case of the *Southern Express Company v. Missouri & Little Rock Railway Company*.

Clarence A. Seward, for the Adams Express Company in all three of the cases; and—

George F. Edmunds, John A. Campbell, and Clarence A. Seward, for the plaintiffs generally.

Gov. John C. Brown appeared for the defendants generally.

Jas. O. Broadhead and Thomas J. Portis, for the St. Louis, Iron Mountain & Southern Railway Company.

B. C. Brown, for the Missouri & Little Rock Railway Company.

G. W. Peck, for the Atchison, Topeka & Santa Fe Railway Company.

Lyman K. Bars, for the Denver & Rio Grande Railway Company.

Thomas J. Portis, for the Missouri, Kansas & Texas Railway Company.

MILLER and McCrARY, JJ., being absent, TREAT, D. J., read the following opinion and order in the first of the above-entitled causes:

MILLER, Justice. In these cases, argued before me at St. Louis with Judges McCrary and Treat, I can do no more than present certain general conclusions at which my mind has arrived in regard to the propositions argued by counsel.

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized; that while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried, and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steam-boats and railroads; that the object of this express business is to carry small and valuable packages rapidly in such a manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like.

2. It has become law and usage, and is one of the necessities of

this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it; and to refuse permission to this agent to accompany these packages on steam-boats or railroads in which they are carried, and to deny them the right to the control of them while so carried, is destructive to the business, and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger the railroad company is no longer liable to all the obligations of a common carrier, but that, when loss or injury occurs, the liability depends upon the exercise of due care, skill, and diligence on the part of the railroad company.

4. That under these circumstances there does not exist, on the part of the railroad company, the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyances by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business. If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but, until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation, and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

7. I am of the opinion that a court of equity in a case properly made out has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use, necessary to that end.

8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is

rendered to ascertain the necessary compensation and compel its payment.

9. To permit the railroad company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, [trip,] would be to enable them to defeat the just rights of the express company, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty I think that the court can assume that the rates or other mode of compensation heretofore existing between any such companies are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the court at stated intervals, and claim an addition to or rebate from the amount so paid; and, to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. Where no such arrangement has heretofore been in existence, it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to matter, etc.

12. I am of the opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies.

In the case of the *Southern Express Co. v. Iron Mountain & Southern R. Co.*, McCrary, J., made the following order:

In this case it is ordered that the injunction hereinbefore granted shall remain in force until otherwise ordered by the court. Counsel will be heard at a convenient time upon the question of the form of the decree to be entered herein, in pursuance of the opinion of the court, announced by Mr. Justice MILLER, and herewith filed.*

*On concluding the reading of Justice MILLER's opinion, Judge TREAT said that when Justice MILLER and Judge MCCRARY were present he did not under the law have any voice in the decision of the case. Were it not so, he would put in writing a dissenting opinion as to some of the conclusions stated, for he was clearly of the opinion that it was beyond the powers and functions of the court to hold, practically, under their control the administration of railroad affairs as to freight and other business. The powers of the court extend no further than to compel equality of rates without discrimination, but not to settle or prescribe rates.

For final decree see post, 869.

BURGESS v. GRAFFAM and others.

(Circuit Court, D. Massachusetts. January 23, 1882.)

1. EQUITY—RIGHT OF JUDGMENT DEBTOR TO REDEEM.

Where the statute of a state gives a judgment creditor power to sell unencumbered estates, (St. Mass. 1874, c. 188,) and no notice is required to be given to the debtor unless he is found within the county, and the debtor resides in a distant city, a court of equity will permit an amendment to the complainant's bill for relief, if the facts authorize a redemption, though the period for redemption has passed.

2. SAME—WANT OF NOTICE—RELIEF FROM MISCHANCES.

Where the plaintiff had no actual notice of the sale of the land under execution, and could have had none, except by some accident, and the land was sold for about one-fiftieth part of its value, equity will relieve, although through some failure of notice, not imputable to the defendant nor to the complainant, the complainant has lost her estate. Courts of equity were instituted to relieve from such mischances.

3. SAME—PURCHASER WITH NOTICE.

Where a party bought an estate two or three days after a bill was filed for about one-fourth of its value, the deed not containing the true date nor the true price, and he had a written agreement with his vendor regulating their respective rights in case of litigation with plaintiff, he is a purchaser with notice.

In Equity. Bill for relief.

This bill, brought by Christine J. Burgess, of Providence, Rhode Island, against sundry citizens of Massachusetts, charged that the defendants Graffam and Newhall severally obtained judgments against her, in Massachusetts, upon pretended debts not justly due them, of \$28 and \$30, respectively, with costs; and that they and the attorney and deputy sheriff, and the other defendants, conspired to deprive her of a house and land in Melrose, used by her as a residence in summer, and worth \$10,000, with no encumbrance upon it; that they carried out the conspiracy by selling the said estate, upon the executions, to the judgment creditors themselves, for \$73.10 and \$81.21, respectively, without notice to her, and by keeping the sales from her knowledge until the year had expired which the statute allows for redeeming lands sold on execution; that Newhall then sold out to Graffam, who, with certain of the other defendants, took forcible possession of the house, and removed and converted furniture and other personal property, worth \$3,000, and committed other trespasses; that the complainant had offered to pay to Graffam the amount for which the property had been sold upon the executions, with reasonable costs and charges, but that he had refused to

take less than \$750 for a release of his interest in the estate. The bill prayed that Graffam might be enjoined from committing any waste, and from selling the premises, and might be required to deliver them to the complainant. The answer of Graffam denied all fraud, combination, and conspiracy, and averred that the judgments were duly obtained against the complainant after notice and appearance, and that the property had been duly and legally sold at auction; that the year for redemption had expired, and the title of Graffam had become perfect; that he had duly and properly bought Newhall's title, and was the legal and equitable owner of the estate; that all the proceedings were open and public, and the complainant knew of them, or might, with reasonable diligence, have known of them; that he removed and stored the personal property, as he had a right to do, and gave the plaintiff notice of the fact. The answer further averred that Graffam had sold all his interest in the estate to Herbert F. Doble, of Quincy. The other defendants answered, denying all fraud and conspiracy, etc. The plaintiff amended her bill, and made Doble a defendant, alleging that he was not a *bona fide* purchaser, and that he bought with notice.

E. P. Brown and Belva A. Lockwood, for complainant.

A. A. Ranney, for defendants.

LOWELL, C. J. Of the actions against her the defendant had notice, and she cannot aver and prove, in this collateral suit, that they were not founded upon just debts. By a recent statute of Massachusetts the power of a judgment creditor to sell his debtor's lands at auction, which was formerly confined to equities of redemption, has been extended to unencumbered estates. St. 1874, c. 188; *Hackett v. Buck*, 128 Mass. 369; *Woodward v. Sartwell*, 129 Mass. 210. No notice is required to be given to the debtor unless he is found within the county. A notice must be posted in the town, and one in each of two adjoining towns, and must be published in some newspaper printed in the county. These notices are not intended for the information of the debtor, as is apparent from their character, and from the fact that they are equally essential when the debtor has had personal notice as when he has had none. Their office is to inform the public, and obtain bidders at the sale.

In the sale on Graffam's execution all the forms of law were complied with. It was made at the office of the sheriff, as is not unusual. There were no bidders excepting the creditor, and the sheriff did not adjourn the sale, as he should have done, if he had any reason to suppose that competitors would appear at the adjournment. I do not

know that there was any hope of this, for the law requires no notice of the adjournment excepting a proclamation at the time and place of the original sale. I cannot agree that the sheriff stands in a fiduciary relation to the debtor. He is a mere agent or servant of the law, and must be protected if he has honestly carried out the instructions of the statute.

I do not find a conspiracy among these defendants, such as is charged against them. I think it probable that Graffam was angry with the complainant for her neglect and refusal to pay his small bill; that he hoped to obtain power over her, by a failure on her part to learn of the sale, in order that he might compel her to do what he considered right; that is, to pay him and his attorney handsomely, according to their own views of liberality, for their time and trouble and vexation. He might have followed methods more advantageous to the complainant. He might have levied on her real estate by appraisement and extent; or, after selling the realty, he might have paid himself from the rents and profits; he might have taken personal property; he might have warned her of the danger in which she stood. Graffam says he did warn her; but it is very doubtful whether the conversation which he testifies to did not take place after the foreclosure was complete. If it was before that time it is the worse for him, because it was a totally inadequate warning, not unlikely to mislead her. This is the only evidence of any act of his which looks like concealment; but I do not think it was intended to deceive her, nor that it did, in fact, deceive her. I believe the truth to be that he did not feel easy to take this valuable estate, even after the foreclosure, until he had given her one more opportunity to pay the debt; and that, finding her still unreasonable, his conscience was appeased.

These several things that Graffam might have done, he did not do; but whatever might be required of him by good morals, or good neighborhood, or a regard to the opinion of mankind, he was under no legal obligation to do any of these things; and, as I have failed to find on his part any positive act of fraud or concealment, or anything more than silence when the law required no speech, I cannot find illegality in his conduct, and, of course, there was no conspiracy on the part of the other defendants. I must, therefore, dismiss the bill as against the attorney, the deputy sheriff, and the defendant Newhall, who sold his judgment to Graffam, as he had a right to do, and the defendants who removed the furniture. If these persons are liable to suit, it is in trespass or trover.

The only remaining questions are whether Doble is a *bona fide* purchaser without notice; and whether the plaintiff can and ought to be permitted to redeem the estate. By a recent statute of Massachusetts a *lis pendens* is not to affect the title to real estate, except as to the parties to the suit, and volunteers and persons having actual notice, until a memorandum containing certain particulars of the suit has been recorded in the registry of deeds, and no such memorandum was filed by the defendant. Whether this statute must govern the action of the circuit court in equity I do not now consider. Doble, in my opinion, is either not a purchaser, or he is one with notice. He bought the estate two or three days after the bill was filed for about one-fourth of its value; the deed does not contain the true date, nor the true price; and he had a written agreement with Graffam, regulating their respective rights in case of litigation with this plaintiff within three years. The litigation was already begun, to be sure, but he had notice that it was probable, and provided against that contingency. He is clearly a purchaser with notice, unless the whole contrivance was the cover of a sham sale, which I am inclined to think it was.

The bill is not framed as a bill to redeem, but all the facts necessary to such a bill have been pleaded and proved; the technical defect is that the complainant does not ask for redemption, nor offer to pay what is due. The court has full power to permit an amendment at this stage of the case, if the facts authorize a redemption. *Neale v. Neales*, 9 Wall. 1.

The land was sold for about one-fiftieth part of its value, with all due form; but it is not usual to sell land for so small a debt, when there are readier means for collecting it, by levy and extent, or by taking personal property. For this reason I do not think I ought to hold the complainant to have lost the estate by her negligence. She had no actual notice of the sale, and could have had none, except by some accident. She knew that her property might be taken to pay the debt; but there is no evidence that she knew that, by the operation of law, 50 times the debt was likely to be taken.

I hold, therefore, that through some failure of notice, not imputable to the defendant Graffam, because he was not bound to give notice, and not imputable to the complainant, who happened to live in a distant city, she has lost her estate by a harsh and intentionally undisclosed act of the defendant, though a disclosure was not legally obligatory.

Courts of equity were instituted to relieve against such mischances.

A very analogous case of relief is found in *National Bank of N. A. v. Norwich Savings Soc.* 37 Conn. 444. There a decree of foreclosure had been made by a court having jurisdiction, and a second mortgagee had notice by mail, as required by the statute, and the decree recited that notice had been given; but, as it had not been received, the foreclosure was opened after the full time allowed by the decree had expired.

There are many cases where statutory foreclosures are held conclusive in equity but they are cases in which there was actual notice, and the only question was whether, when a statute has given ample time for redemption, by parties having notice, anything short of fraud should be permitted to excuse a failure to act within the ample time allowed by statute.

I hold, therefore, that the plaintiff may amend within 60 days, on these terms: that she shall pay all costs to the date of this decree, and a reasonable attorney fee to the counsel who conducted the case for the defendants. If this is done, she may redeem against Grafam and Doble.

Interlocutory decree accordingly.

CARRIER v. TOWN OF SHAWANGUNK.*

(Circuit Court, S. D. New York. February 9, 1882.)

1. MUNICIPAL BONDS—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE OF INVALIDITY.

A purchaser before maturity of municipal bonds payable to bearer, is not, *ipso facto*, chargeable with constructive notice of their alleged invalidity because he undertook to satisfy himself by investigation that the condition necessary for their issuance had been fulfilled, and did not rely on their face. Such knowledge, when there are no marks of infirmity on the face of the bonds and no want of power in the municipality, is a question of fact.

2. SAME—SAME—RECITAL OF FULFILMENT OF CONDITIONS.

Where the officers issuing municipal bonds are invested with power to decide whether the conditions precedent to their issue have been complied with, their recitals to that effect in the bonds, when held by a *bona fide* purchaser, are conclusive.

Motion for new trial.

Charles C. Leeds and Charles H. Winfield, for plaintiff.

D. M. De Witt, for defendant.

*Reported by S. Nelson White, Esq., of the New York bar.

SHIPMAN, D. J. This is an action at law to recover the amount due upon sundry bonds for \$2,400 issued by the town of Shawangunk, and payable to bearer. The bonds recited that they were issued in pursuance of the act which is hereafter mentioned, and by duly-appointed commissioners.

The second section of chapter 880 of the session laws of 1866 provided that it should be lawful for the commissioners appointed by the county judge, upon the application of twelve freeholders, residents of the town, to borrow on the faith and credit of the town such sum of money as the tax-paying inhabitants of the town should fix upon by their assent in writing, not exceeding a specified percentage of the assessed valuation of the property of the town for the year 1865:

"Provided, however, that the powers and authority conferred by this section shall only be exercised upon the condition that the consent shall first be obtained in writing of such number of the tax-payers of such town, their heirs, or legal representatives, appearing upon the last assessment roll for the year 1865, as shall represent a majority of the taxable property of such town; proof of which shall be by the acknowledgement or proof thereof as required for deeds of real estate filed in the town and county clerks' offices of the respective counties, and annexed to a copy of the assessment roll of the town for 1865. * * *

For the purpose of showing that the plaintiff, whether a purchaser for value or not, had the title and rights of a *bona fide* holder, because he was the successor of the Dime Savings Bank, which was a purchaser for value before maturity, and without notice of any claim of non-liability on the part of the town, the plaintiff proves, by the attorney of the bank, that before the purchase and before maturity he investigated whether the consent of the town to the issue of the bonds had been obtained as prescribed by the act. Before the examination he had never heard of any claim on the part of the town, or its officers, that the bonds were invalid. He examined a certified copy of the consent and assessment rolls of the town, and ascertained that the majority of the persons upon the assessment list had signed the petition or consent to the bonding of the town, and that the consents represented a majority of the property of the town, and that these facts had been certified to by the proper officers. The witness testified:

"I carefully added up and reviewed the additions already added up, proved the figures, and found them correct. I counted the names for myself, and I read the certificate. It was the county clerk's of Ulster county. * * * I ascertained that all the names on the consent roll were on the assessment roll, and checked them off and added up the amount of the property."

The result of the investigation was reported to the bank, which thereupon bought a large amount of the bonds for 90 per cent. of their par value. The certified copy was delivered to the bank, and was thereafter mislaid and lost.

It was not claimed by the defendant that the bank had any actual notice of any alleged invalidity of the bonds, but the defendant, after the plaintiff had rested, offered a certified copy of the consent roll of the town, in pursuance of which the bonds were authorized to be issued, together with a certified copy of the assessment roll of the town for the year 1865, to show that the consent of the majority in value of the tax-payers was not obtained, and insisted "that the bank must stand or fall by the roll as it in fact was, not by any mistaken interpretation of it by its attorney; that it was not a *bona fide* holder without notice, because it had undertaken to investigate the matter, and did not rely on the face of the security."

The court excluded the evidence, to which ruling the defendant excepted, and a verdict having been subsequently directed for the plaintiff, filed a bill of exceptions and a motion for new trial. The question in regard to the exclusion of the certified copies of the consent and assessment rolls, for the purpose for which they were offered, was the only one which was argued by the defendant.

It will be observed that these rolls were not offered either upon cross-examination of the attorney or as independent evidence to show that he had actual notice of any defect in the number of consents, or that he would have had notice if he had exercised reasonable diligence; but they were offered upon the alleged ground that, inasmuch as the bank's attorney had examined certified copies, it therefore could not be a *bona fide* purchaser, if a comparison of the consent roll with the assessment roll would show that the consent of a majority in value had not been obtained, although diligent scrutiny, at the time of the purchase, did not disclose the alleged fact.

The defendant's proposition was that the purchaser before maturity of municipal bonds, payable to bearer, is not a *bona fide* holder if he undertakes to investigate the validity of the bonds which he proposes to buy, and investigation would have revealed to him a defect, although it was not disclosed by diligent examination, and that such purchaser is charged with notice of all that a complex record might show, although it is not claimed that he had notice of any defect in the bonds, and it is clear that diligent scrutiny of the copies of the public records which were furnished to him did not disclose any suggestion of such defect. No such artificial rule in regard to notice has

been established. It is true that purchasers of municipal bonds are charged with notice of the laws of the state which authorized the issue, and of a want of power in the municipality or its officers to execute or issue the bonds. In this case, it is fairly to be gathered from the statute that the commissioners were invested with power to decide whether the proper number of tax-payers had consented, and whether, therefore, the condition precedent had been complied with, and their recitals in the bonds, when held by a *bona fide* purchaser, are conclusive. *Coloma v. Eaves*, 92 U. S. 484; *Humboldt v. Long*, 92 U. S. 642; *Walnut v. Wade*, 103 U. S. 683. Knowledge, by the purchaser of municipal bonds before maturity, of their invalidity, when there are no marks of infirmity on the face of the instrument, and there is no want of power in the municipality or its officers to execute and issue the bonds, is a question of fact. It being admitted that the purchaser before maturity, for value, had no actual notice or suspicion of any defect, and the bonds in substance reciting compliance with the condition precedent which was required by the statute, the arbitrary rule claimed by the defendant, which declares that he did have constructive notice of a defect, does not exist.

The motion for a new trial is denied, and the stay of proceedings is vacated.

HAMMOND v. OLMSTEAD BROS.

(Circuit Court, D. Connecticut. February 16, 1882.)

1. AGENCY—ACCOUNTING WITH PRINCIPAL.

Where in an accounting with the principal an agent sells the property of his principal under instructions, at various dates, upon a fluctuating market, the subsequently placing all the sales as of one date is improper, and he will be liable to his principal for the balance between what he received and what he accounted for.

SHIPMAN, D. J. This is an action at law, which, by written stipulation of the parties waiving a trial by jury, was tried by the court. The facts which are found to be true are as follows:

On August 11, 1879, the plaintiff owned two cribs of unshelled corn in the town of Dunlap and state of Iowa. The defendants were his agents for the purchase and sale of the corn. They were authorized by letter of August 11, 1879, upon certain conditions not material to the present case, to sell 10,000

bushels for 34 cents or more per bushel, and to sell the balance for 37 cents or more. On September 6, 1879, they sold, through S. H. McCrea & Co., of Chicago, 10,000 bushels at 34½ cents per bushel, to be delivered in October.

On August 25th the plaintiff, fearing that one of the cribs was weak and might fall, instructed the defendants to sell what could not be made safe. On August 28th he telegraphed them to "hold on if you have not sold." By letter of the same date he wrote that he concluded to wait until he had heard more definitely the condition of the cribs. On September 5th he wrote them to sell the weak crib, with no restrictions as to price, and "the balance hold till we know how the new crop comes in, or touches 34, when sell up to 10,000." It is evident that the latter part of this restriction had reference only to 10,000 bushels. It was not intended to alter the directions which had been previously given as to the residue of the corn. If the price should touch 37, (which was then considered very doubtful,) they were authorized to sell. The sale of September 6th was satisfactory to the plaintiff.

On September 20, 1879, the defendants sold, through S. H. McCrea & Co., 15,000 bushels at 37½ cents per bushel, to be delivered in October, and the same day telegraphed the plaintiff that they had sold 10,000 bushels at the price above named.

The plaintiff had purchased and put into the cribs, in the winter of 1878-9, what was estimated at 26,165 bushels. Corn always shrinks somewhat in drying, and some is taken by cattle, or stolen from the cribs, so that a shrinkage is expected when it is shelled. On September 26, 1879, the defendants commenced shelling the plaintiff's corn, and in due time it was shipped to Chicago.

On October 17, 1879, corn was rising in price, and the plaintiff, supposing that about 6,000 bushels were unsold, telegraphed the defendants to "let McCrea handle the balance of the corn on this market, and hold and sell on break," to which telegram the defendants replied in the following letter, dated October 18, 1879.

"Your telegram was received last evening, asking us to let McCrea handle the balance of the corn on this market, and hold and sell on break. We answered you by red message that we can't get cars fast enough to fill sale, but will ship as fast as possible. We (in common with all other shippers) have been terribly troubled about the shortage and scarcity of cars. The railroad seems to be doing so much business that we only get about two or three cars when we want six, and so we dare not sell the balance of your corn in a round lot because the chances are we wouldn't be able to fill it without loss to you; but we will continue to ship as fast as possible, and we think you will get the balance in on these good prices. Sorry we sold quite so soon, but no one dreamed of such an advance. Will send you check for \$1,600 as soon as we get account sales as you requested."

Other letters passed from defendants to plaintiff of no especial importance to the present issue. A letter of October 22d did not tend to change the plaintiff's understanding in regard to the sale of September 20th, but would naturally have the contrary tendency.

On December 5, 1879, and on January 13, 1880, the plaintiff was in Dunlap, and was told by the defendants that his corn amounted to 24,492.30 bushels, and that the sale of September 20th was of 15,000 instead of 10,000 bushels, and

that they supposed that they had so informed him by telegraph. The defendants have not been in the habit of selling their own corn for future delivery. They usually cribbed a small crib, and also purchased, in the summer, corn which they were in the habit of sending to McCrea & Co., to be sold as it arrived. Corn sold at the market rate, to be delivered in the future, is always sold in lots of 5,000 bushels, or multiples of 5,000. If smaller lots are sold for future delivery there must be a discount from the market rates. In 1878-9 the defendants had a crib of about 3,000 bushels. They sold corn to McCrea & Co. in September, October, and November, 1879, in addition to the 25,000 bushels upon future delivery, as follows:

Sept. 10	.....	1,354.06	bushels at	33 $\frac{1}{2}$	cents.
" 11	.....	427.08	"	" 33 $\frac{1}{2}$	"
Oct. 13	.....	381.34	"	" 37 $\frac{1}{2}$	"
" 17	.....	523.12	"	" 39	"
" 22	.....	945.10	"	" 46 $\frac{3}{4}$	"
" 23	.....	947.08	"	" 45 $\frac{1}{2}$	"
" 25	.....	1,440.20	"	" 45 $\frac{1}{2}$	"
" 28	.....	944.46	"	" 42	"
" 29	.....	992.38	"	" 41	"
" 31	.....	415.20	"	" 41 $\frac{3}{4}$	"
Nov. 3	.....	395.10	"	" 42 $\frac{3}{4}$	"
" 11	.....	484.46	"	" 42 $\frac{3}{4}$	"

In the winter of 1879-80 the defendant bought a new lot of unshelled corn for the plaintiff, so that, crediting him at the rate of 37 $\frac{1}{2}$ cents for 14,492 bushels, he owed then \$79, which he paid.

There is no dispute in regard to the sale of 10,000 bushels at 34 $\frac{1}{2}$ cents on September 6th.

This suit is brought to recover from the defendants the amount which the plaintiff claims they received for his corn in excess of 37 $\frac{1}{2}$ cents per bushel for 14,492 bushels, or damages for breach of contract.

The plaintiff claims damages because his corn would have amounted to more than 14,492 bushels had the defendants exercised the care required by the contract. He claims that there was or should have been an excess above 37 $\frac{1}{2}$ cents, because the defendants violated their instructions in selling at that sum, and did not send the balance to McCrea for sale, but sold it themselves from time to time; and, lastly, if no instructions were violated, they sold but 10,000 bushels at 37 $\frac{1}{2}$, and the residue at a greater sum.

The first two positions are untenable. The plaintiff's case must rest entirely upon the third point. If 15,000 bushels of the plaintiff's corn were sold on September 20th, it was a sale in pursuance of existing restrictions.

It is clear that the defendants sold on September 20th 15,000 bush-

els to be delivered in October, and that they telegraphed the plaintiff that they had sold 10,000 bushels. They say that when they learned in January, 1880, that their telegram was for 10,000 it was a great surprise. That the mistake was caused by the hurry and press of business; that it was not their custom to sell for future delivery; that on September 20th they had not 5,000 bushels on hand, and that they would not undertake to sell what they did not have; and, in brief, that the information which the telegram gave was a mistake, while in fact the plaintiff's corn was sold and delivered under the contract of September 20th.

Were it not for the defendant's letter of October 18, 1879, I should think that this was the correct theory, and I should much prefer to adopt it. But unless they supposed, when they wrote on October 18th, that they had about 5,000 bushels of the plaintiff's corn, the letter is senseless.

They had bought 26,165 bushels. There is always a shrinkage from the purchased amount. They had sold, as they now say, 25,000 bushels. Under the most favorable circumstances, considerably less than 1,000 bushels would remain. The plaintiff wrote to let McCrea handle the balance. They reply as though they had a large quantity on hand. "We can't get cars fast enough to fill sale, but will ship as fast as possible. * * * We dare not sell the balance of your corn in a round lump, because the chances are we wouldn't be able to fill it without loss to you." A "round lot" means a lot of 5,000 bushels. This letter shows, beyond dispute, that the writer thought, on October 18th, he had about 5,000 bushels of the plaintiff's corn to sell, and that he was intending to ship it from time to time, and let it take the chances of the market. The subsequent placing all the plaintiff's corn under the sale of September 20th was improper.

The defendants received for the plaintiff's corn \$314.19 more than they credit him in the account, and he is entitled to recover said sum, with interest from December 5, 1879.

Let judgment be entered accordingly.

WORLEY, Adm'r, etc., v. NORTHWESTERN MASONIC AID ASSOCIATION.

(Circuit Court, D. Iowa. 1882.)

L. CORPORATIONS FOR BENEVOLENT PURPOSES — CERTIFICATES PAYABLE TO DEVISEES—ADMINISTRATOR—ACTION BY.

An administrator cannot maintain an action on a policy or certificate, issued by a corporation incorporated for benevolent purposes under the statute of Illinois, approved April 18, 1872, as amended by an act approved March 28, 1874, by which policy or certificate the corporation agreed to pay to the devisees of decedent a sum of money within 30 days after proof of his death.

The plaintiff, in his petition, states that Phillip H. Worley, deceased, died on or about the twenty-second of October, 1880, intestate, and that the plaintiff is the duly-appointed administrator of his estate; that the defendant is a corporation organized and existing under the laws of Illinois; that among the papers of decedent were two policies or certificates issued by the defendant, whereby the defendant agreed and contracted to pay to the devisees of said decedent, within 30 days after receiving evidence of said Worley's death, certain sums of money, to be arrived at and computed from the number of members in the division of which the decedent was constituted a member of said association by such certificate, at a sum certain for each member of the respective class in such division.

The plaintiff avers that he fully performed all covenants and conditions on his part; that satisfactory proofs were made to the company of the death of Phillip H. Worley; that the amount due in the aggregate upon the two certificates is the sum of \$8,299.55; and that the defendant refuses to pay the plaintiff the amount due upon said policies or contracts.

The defendant, for answer, states that it is not a life insurance company, nor a corporation for pecuniary profit; that it is organized for benevolent purposes, solely under the provisions of the statute of Illinois, approved April 18, 1872, as amended by an act approved March 28, 1874, and providing for the organization of corporations, not for pecuniary profit, by three or more persons making, signing, or acknowledging, and filing in the office of the secretary of state, a certificate stating the name and the title by which said corporation or society or association shall be known in law, the particular business and objects for which it is formed, etc.; that the defendant has no capital stock, and that its sole object and purpose, as declared in the certificate, is to procure pecuniary aid to the widows, orphans, heirs, and devisees of the deceased members of said association; that by

said act under which the defendant was organized it is provided that "associations and societies which are intended to benefit the widows, orphans, heirs, and devisees of deceased members thereof, and where no annual dues and premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies," the business of insurance not being one for the carrying on of which corporations can, by the terms of said act, be organized; that the defendant is an association such as is described in the act of March 28, 1874, no annual dues or premiums being paid or required to be paid by its members, and no money or profits paid or contemplated to be paid to them; that the benefits arising from membership in said association accrue solely to the widows, orphans, heirs, or devisees directly for their own sole benefit, and are not part of the estate of such deceased member, or payable to his administrator; that the benefits arising from the membership of said Phillip H. Worley in said association, as shown by the certificate set forth in the petition, are payable to his devisees and not to other persons; and that said plaintiff, as administrator of the estate of said Phillip H. Worley, is not entitled to receive the same. Defendant avers that it has no knowledge or information sufficient to form a belief whether said Phillip H. Worley died intestate, and submits that the grant of letters of administration on his estate to the plaintiff would not bind the devisees or legatees of the last will of said deceased, if such will should be proved to exist, nor would a payment to plaintiff, as administrator, protect the defendant from liability to such devisees or legatees, if any such should prove to be.

The plaintiff demurs to the defendant's answer, and the case is before us upon the demurrer.

E. F. Richman, for plaintiff.

Putnam & Rogers and *W. J. Culver*, for defendant.

LOVE, D. J. This action, in both form and substance, proceeds upon a breach of contract. The contract is contained in the certificates, copies of which are exhibited with the petition. The certificates provide that, for certain considerations therein mentioned flowing from Phillip H. Worley, deceased, the association promises and agrees to pay to the devisees of said decedent certain sums of money therein specified. In order to maintain the action the plaintiff must allege and show a breach of the contract. What breach has the plaintiff assigned? What breach can he assign? He has not alleged that the defendant association has failed, neglected, or refused to pay to the devisees of the decedent the sums of money in question. This

could not be alleged or shown, because the plaintiff has himself stated that there are no devisees in existence. The breach upon which the plaintiff must rely is the non-payment of the money to him as administrator of the decedent's estate. But is this a breach of the stipulations of the contract? The contract is not that the defendant company shall pay to the decedent in his life-time, or to the administrator of his estate at his death. The contract could not have made such a provision, since it would have been utterly repugnant to the whole purpose, scope, and design of the association, as provided in the very law of its existence. Would a contract by the defendant to pay money to the decedent during his life, or to the administrator of his estate at his death, have been valid under the second article of incorporation, providing that the business and object of the association is to secure pecuniary aid to the "widows or orphans, heirs and devisees of deceased members of the association?" In the present case the contract is by its express terms to pay to the devisees. Was it any breach of this contract not to pay to the administrator of the estate? Would it have been a breach to have refused payment to the widow, orphans, or heirs of the deceased?

The stipulation entered into by the members of this benevolent or charitable association was to pay money in certain proportions to the devisees of the decedent; that is, to such person or persons as he should appoint by his will to receive the money. It so happens that he died without appointing any beneficiary of his bounty. Is it any breach of the stipulation not to pay to the widow or the orphans or the heirs, or to the creditors of the decedent? Neither the decedent nor the defendant corporation intended by this contract to provide for the widow, heirs, orphans, or creditors of the decedent. The expression of one thing excludes other and different things. The designation of devisees in the contract excludes the other classes—the heirs, widow, orphans, and creditors. Who will undertake, without violence to the known meaning of words, to say that the word "devisees" in this contract can be construed to mean directly or indirectly the widow, or orphans, or creditors? But if the administrator shall receive the money due upon this contract it will go through his hands to one or all of these classes of beneficiaries. Indeed, I see no escape from the conclusion that if the administrator shall collect the money it must go primarily to the decedent's creditors. The only ground upon which the administrator can enforce payment is that the money belongs as assets to the decedent's estate. He surely cannot collect the money as representative of the widow, orphans, or heirs

at law, and for their exclusive benefit; since in making a contract for the payment of money to "devisees" the decedent clearly excluded the other classes for whose benefit alone he could have contracted according to the articles of incorporation. Since, then, the administrator must, if he collects the money at all, proceed upon the ground that it is assets of the estate, it is clear that the creditors must be first satisfied—a result manifestly inadmissible. No one, surely, will seriously contend that the creditors of the decedent are entitled to payment out of the fund in question.

Why the decedent did not by will appoint some beneficiary, some devisee, to receive his bounty under the contract in question we know not. He was himself a Mason, and a member of the benevolent association represented by the defendant corporation. He may, in making the contract, have had in contemplation some individual whom he purposed to make the object of his bounty, and he may have changed his mind with respect to the object of his intended bounty. He may have made up his mind that his associates should not be called upon to contribute the sums required to fulfil the contract which he had entered into with the corporation. At all events, he died without appointing by will any one to receive the money, and the only presumption we can indulge in is that he intended not to do what he omitted to perform. Can we presume without proof that he failed to appoint devisees, as contemplated by the contract, in consequence of carelessness or inadvertence? Is negligence to be presumed?

If B. stipulates with A., upon a consideration flowing from A., to pay money to C., how must A., suing B. upon the contract, assign the breach? Must he not allege the non-payment to C. as the breach of the contract? Would it not be a fatal variance to assign the non-payment to A. as the breach of the contract? And, A. dying, must not his administrator, suing at law to enforce the contract, allege the breach to be a non-payment of the money to C.? The contract providing that the money be paid to C., the administrator would certainly fail on the ground of variance if he assigned as a breach of the contract non-payment to any party other than C. So, in the present case, the administrator must assign his breach to be the non-payment to the decedent's devisees, as required by the contract.

To meet this difficulty the complainant's counsel suggested in the oral argument the analogy between a note payable to the order of the payee and the present case. Suppose the payee should die without making any order appointing the party to whom payment should be

made, would his administrator be precluded from maintaining his action upon the instrument? Certainly not; but the difficulty with this argument is that there is no real analogy between the two cases. A note payable to the order of the payee is to all intents and purposes, in legal effect, payable to the payee himself. The note becoming due, the payee may sue upon it in his own name, and recover judgment. He need not assign or indorse it, or in any other way order the note to be paid to any third person. But in the present case it was not the legal effect of the contract that the money was payable to the decedent in his life-time. He could have maintained no action at all upon it. What the very contract provided was that the money should, after his death, be paid to such persons as he should, by will, appoint to receive it. This was its legal effect, as evidenced by its express words; and the question is, can the administrator step in and enforce it contrary to its legal effect? Can he sue upon the contract, alleging it to be payable to any one except the decedent's devisees? And if he should recover the money, can he pay it out in distribution to any one but the devisees of the decedent?

Since the argument of this case at the bar, the question of the right of an administrator to sue in a case like the one now before us has been before the supreme court of Iowa in the case of *McClure v. Johnson*, 10 N. W. Rep. 217. In this case the supreme court decided that the money due upon such a policy does not belong to the estate of the decedent as assets; that the only person who has any interest in it, and who can sue for it, is the beneficiary; and that the executor can maintain no action, the estate not being entitled to the money. The court further holds that the Code, §§ 2372, 1182, "contemplates a case when the policy of insurance is payable to the deceased or his legal representative," and not when it is payable to another person for the use and benefit of such person. The court distinguishes this case from *Kelly v. Mann*, 10 N. W. Rep. 211. In that case, says the court, the money received from the insurance company was assets belonging to the estate, and being such it was held under the statute that it should be inventoried and disposed of according to law.

Suppose a devisee had been appointed by the decedent, would not payment to him be good? Would not his acquittance be a valid discharge of the obligation to the defendant? And in such case could the present administrator maintain an action upon the contract to recover the money from the devisee as assets belonging to the estate?

This was the very point decided in *McClure v. Johnson, supra*. It was there held that such an action could not be maintained because the money due was not assets belonging to the estate.

And so, in the case before us, the action cannot prevail because the administrator has no title to the contracts sued on, either by operation of law or by express terms of the instruments. If he had the legal title to the chose in action, and if its proceeds, when collected, were assets belonging to the estate, he could maintain a suit for the money in whosoever hands found.

Demurrer to answer overruled.

McCrary, C. J., concurs.

WALLER v. NORTHERN ASSURANCE CO.

(Circuit Court, D. Iowa, N. D. April, 1881.)

1. INSURANCE POLICY—PROVISIONS BINDING ON INSURED—WAIVER NOT PRESUMED.

Where the terms of a policy of fire insurance provide that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the uses and benefit of the assured, or if the building stands on leased ground, it must be so represented to these companies and so expressed in the written part of this policy; otherwise the policy will be void." It is the duty of the party applying for insurance to disclose the nature of his interest in the property to be insured, and from the mere fact that the company's agent made no inquiry concerning the extent of applicant's interest, a waiver of the provision on the part of the company cannot be presumed.

2. SAME—ENFORCEMENT OF PROVISION.

Such provisions must be upheld and enforced, not simply on the ground that it is a warranty to be enforced independently of their materiality, but upon the ground that it calls for the disclosure of material facts.

At Law. On motion for a new trial.

This is an action at law upon a policy of fire insurance to recover damages for the destruction by fire of a certain building. The policy sued on declares that John R. Waller has paid the premium for insuring against loss or damage by fire the property hereinafter described, in the several sums following, to-wit: On his five-story, shingle-roof frame building, etc. Said policy further provides as follows:

"If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building stands on leased ground, it must be so represented to these companies, and so expressed in the written part of this policy; otherwise the policy will be void."

It appeared on trial, and the fact was found by the jury, that the interest of the assured was that of a mortgagee only, though he held by a deed unconditional on its face and was in possession. When the assured applied for the insurance no inquiries were made by the company's agent, and no representations were made as to the nature and extent of the plaintiff's interest in the property, and there was no statement in the policy concerning the same. The property was found by the jury to be of the value of \$8,000 or \$9,000, and it is conceded that the interest of the assured therein was much less, being only about \$5,000. Plaintiff moves to set aside the general verdict in favor of defendant upon the ground that it is inconsistent with the general findings, which are in substance stated above.

Shiras, Van Duzee & Henderson, for plaintiff.

Finke & Lyon, for defendant.

MCCRARY, C. J. The policy provides that "if the interest of the assured in the property be any other than entire, unconditional, and sole ownership of the property for the use and benefit of the assured, * * * it must be so represented to the insurer, and so expressed in the written part of the policy, otherwise the policy will be void." The interest of the assured in the property insured in the present case was not an entire, unconditional, and sole ownership, but on the contrary he held only a lien in the nature of a mortgage given to secure a loan of some \$5,000. This fact was not represented by the assured to the defendant, and is not stated in the policy.

There is no proof tending to show that the defendant was aware of the fact. On the contrary, it clearly appears that the plaintiff's mortgage, so far as the record disclosed the facts, is a secret lien, being a conveyance absolute on its face; and since it was accompanied by actual possession in the mortgagee, there was nothing to rebut the presumption that he was the absolute and sole owner. These circumstances made it the duty of plaintiff to disclose the nature of his interest, even if it were conceded that a mortgagee out of possession, and whose interest is disclosed by the record, might be excused from so doing. There are strong reasons for upholding and enforcing the provision of the policy under consideration. It is certainly a very

reasonable and proper provision in a contract of insurance of this character, which requires the party seeking insurance upon property to state any facts which it is material for the insurer to know. That the nature and extent of the assured in the property is material, must appear very clear upon the least reflection.

In *Ins. Co. v. Lawrence*, 2 Pet. 25, *Marshall*, C. J., in delivering the opinion of the supreme court of the United States, speaking of this very question, said:

"It may not be necessary that the person requiring insurance should state every encumbrance upon his property which it might require of him to state if it was offered for sale, but fair dealing requires that he should state everything which might influence, and probably would influence, the mind of the underwriter in forming or declining the contract.

"A building held under a lease for years, about to expire, might be generally spoken of as the building of the tenant; but no underwriter would be willing to insure it as if it was his, and an offer for insurance stating it to belong to him would be a gross imposition.

"Generally speaking, insurances against fire are made in the confidence that the assured will use all precautions to avoid the calamity insured against which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk; and in estimating the premium, so far as it may influence him in these respects, it ought to be communicated to him."

These observations apply with great force to the present case. The plaintiff appeared to be the owner. The property was worth nearly double the amount of the insurance asked for. Assuming, therefore, that he was the owner, he would have a large interest in guarding against the destruction of the property by fire; but when the fact was developed that he was not the owner, and held only an equitable lien upon the property as security for a sum but little greater than the amount of his insurance, it is seen that in fact his interest in the protection of the property was comparatively slight. It might well be that the defendant, if advised of the facts, would have declined to insure his equitable interest as mortgagee, or would have declined to insure it for a sum so near equal to its full value, or would have charged a much higher premium. The provision in question is, therefore, one which must be upheld and enforced; not simply upon the ground that it is a warranty, and therefore to be enforced independently of its materiality, but upon the ground that it calls for the disclosure of material facts.

Upon this subject, in addition to the case above cited, see the follow-

ing: *Ins. Co. v. Lawrence*, 10 Pet. 507; *Marshall, Fire Ins.* 789; *Jenkins v. Ins. Co.* 7 Gray, 370; *May, Ins.* §§ 272, 287, 289, 291; *Rohrbach v. Ins. Co.* 62 N. Y. 47.

But it is insisted that compliance with this provision of the policy was waived by the defendant company, because its agent made no inquiry concerning the extent of plaintiff's interest, and plaintiff made no statement upon the subject. The evidence does not support this position. The contract was that if the interest of the assured was any other than the entire, unconditional, and sole ownership, then he was to represent the facts to the company,—not that he was to disclose them truthfully if requested, or that he would make true and full answers to questions upon the subject. The duty of disclosing his interest, the same being less than the entire ownership, was plainly devolved upon the plaintiff, and for good reason, since he knew and the agent of the company did not know the facts. In other words, under the contract the defendant was authorized to assume that the property was owned absolutely by the applicant for insurance, unless the contrary was represented by him, and more especially in a case where the applicant held what appeared to be an absolute title. A waiver of this condition of this policy cannot, therefore, be presumed from the mere fact that the agent of the defendant made no inquiry upon this subject.

The case might have been different if the plaintiff had been called upon to sign an application, and to answer written or printed questions touching his interest, and had failed to do so. In such a case the issuing of the policy, notwithstanding a failure to answer some of the questions, might well be held a waiver of such answers. *Hall v. Ins. Co.* 6 Gray, 186; *Liberty Hall Ass'n v. Ins. Co.* 7 Gray, 265. And it may also be true that where the policy requires an application, and provides that it shall contain a full and true exposition of all the facts in regard to the condition, situation, value, and risk of the property insured, a company insuring without such application may be held to waive the representations required to be embraced therein. *Com. v. Ins. Co.* 112 Mass. 136.

These authorities are not in point, for the reason that in the present case no written application was provided for in the policy, and, as already stated, the duty of divulging the fact that he was not the full owner of the property was devolved upon the plaintiff. Besides, it would be an unwarranted extension of the doctrine of estoppel to hold that a party may waive that, the existence of which he does not know, and is not in duty bound to ascertain.

The proof shows, and the fact is found by the jury, that the nature of the interest of plaintiff was not known to defendant prior to the fire. It was a secret interest, and there is nothing in the evidence tending to show that the knowledge on the part of defendant of the nature of plaintiff's interest ought to be inferred. May, Ins. § 506; *Finley v. Ins. Co.* 30 Pa. St. 311; *Farten v. Ins. Co.* 9 Cush. 490; *Allen v. Ins. Co.* 12 Cush. 366.

Motion for new trial overruled.

LOVE, D. J., concurs.

HARVEY, Receiver, etc., v. LORD.

(Circuit Court, N. D. Illinois. January 4, 1882.)

1. NATIONAL BANKS—VOLUNTARY LIQUIDATION—CREDITOR'S BILL—VEXATIOUS LITIGATION—PLEA IN ABATEMENT.

A creditor's bill was filed against a national bank, before the passage of the act of congress of June 30, 1876, (19 St. at Large, 63,) and a receiver was appointed, who took possession of the property of the bank. An amended bill was filed in the cause, after the passage of that act, to secure the benefits of the act, to which all the stockholders were made parties. Subsequently the comptroller of the currency appointed a receiver to wind up the affairs of the bank, and this suit was brought by him against one of the stockholders. *Held*, on demurrer to a plea in abatement, which set forth these facts, that the defendant is entitled to judgment on the ground that, as the stockholder's liability can be completely enforced in the suit in equity, the general rule applies that a debtor shall not be vexed by two suits in the same jurisdiction for the same cause of action.

2. SAME—AUTHORITY OF COMPTROLLER OF CURRENCY—VOLUNTARY LIQUIDATION—RECEIVERS.

Whether the comptroller of the currency is authorized to appoint a receiver for a national bank, which is in voluntary liquidation, after a court of competent jurisdiction has appointed a receiver and instituted proceedings under a creditor's bill to enforce the liability of the stockholders, *quære*.

On Demurrer to a Plea in Abatement.

Mason & Mason, for plaintiff.

F. H. Kales and *H. B. Hurd*, for defendant.

BLODGETT, D. J. This a suit at law brought by Harvey, as receiver of the Manufacturers' National Bank of Chicago, against Thomas Lord, to enforce his liability as a stockholder of the bank. To this suit the defendant has pleaded in abatement that on the third day of February, 1875, one James Irons, who was then a judgment creditor of the

Manufacturers' National Bank, filed in this court a creditor's bill to enforce payment of his judgment; that such proceedings were taken in the case that Joel D. Harvey was appointed receiver of all the property and effects of the bank, and entered upon the discharge of the duties of his office and took possession of the property of the bank; that afterwards, on the fifth of October, 1876, an amended bill was filed in said cause, to which all the stockholders of the bank were made parties, by which the complainant sought, in behalf of himself and all other creditors, to enforce the liability of the stockholders of the bank for the purpose of discharging the indebtedness of the bank; that the defendant in this suit, as one of the stockholders of the bank, was made a party to the Irons suit; that said suit in chancery is still pending, and this suit at law is brought for the same cause, and to enforce the same liability, which the creditor's bill by Irons seeks to enforce as against this defendant; and therefore he prays an abatement of this suit.

At the time the original bill was filed by Irons there was no express provision in the national banking law for the enforcement of a stockholder's liability by the machinery of a creditor's bill, and the supreme court, in *Kennedy v. Gibson*, 8 Wall. 498, had decided that the stockholder's liability could only be enforced through a receiver appointed by the comptroller of the currency. But on June 30, 1876, congress passed an act amendatory of the national banking law which provided by the second section as follows:

"When any national banking association shall have gone into liquidation under the provisions of section 5220 of said statute, the individual liability of the shareholder provided for by section 5151 of the said statute may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof in any court of the United States having original jurisdiction in equity for the district in which said association may be located or established."

The amended and supplemental bill was filed by Irons after the passage of this amendment, and was intended to bring all the stockholders of the Manufacturers' National Bank before the court, and to enforce their liability through the agency of the receiver appointed by the court in that case. This defendant is a party to and has answered in that suit. About a year ago, and long after the amended and supplemental bill of Irons was filed, the comptroller of the currency appointed a receiver to wind up the affairs of this bank, and named the same person whom this court had appointed in the Irons

suit, and under that appointment, acting under the advice of counsel, he has brought suits at law against the stockholders. The only question is whether the suit which had been brought by Irons, and which had been amended to adapt it to the provisions of the act of June 30, 1876, can be pleaded in abatement to this suit at law which has been instituted by the receiver under the authority or sanction of the comptroller. After the filing of the original Irons bill the powers of the court under such a bill were materially enlarged by the act of congress just quoted. That bill was pending when this law took effect, and Irons undoubtedly had the right by amendment to make a case which would enable the court to administer these enlarged powers with which it had been clothed *pendente lite*. Story, Eq. Pl. 336; *Mix v. Beach*, 46 Ill. 311.

It seems to me that there is no room to doubt that this stockholder's liability can be completely enforced in the Irons case; and if it can, then I see no reason why the general rule that a debtor shall not be vexed by two suits in the same jurisdiction for the same cause of action is not clearly applicable. I may also say in the same connection that I have great doubts whether the comptroller had any authority to appoint a receiver for a bank which was in voluntary liquidation, after the court had appointed a receiver and taken steps under a creditor's bill to enforce the stockholders' liability. The statute gives the comptroller authority to appoint a receiver in certain cases, and then in another section of the same statute provides expressly, where a bank has gone into voluntary liquidation and is in process of winding up its affairs, any creditor may enforce the liability of the stockholder by a creditor's bill; and if the comptroller had not acted and appointed a receiver for the purpose of enforcing the stockholders' liability, I have no doubt but what the action of the court supersedes the right of the comptroller to act in the premises, and gives the authority solely to the court to enforce the individual liability of the stockholders.

It cannot, I think, be maintained that congress intended by the act of June 30, 1876, to leave the comptroller any authority over the assets of a national bank which has gone into voluntary liquidation under section 5220, after a court of competent jurisdiction had, under a creditor's bill, appointed a receiver and taken possession of the assets, and initiated proceedings to enforce the liability of stockholders, because that would bring about a conflict between the officers of the court and those of the comptroller. The grant of power to enforce the liability of the stockholders is plenary and ample, and I

see no need for any function of the comptroller when the affairs of the bank are once properly in the hands of the court.

The demurrer to the plea in abatement is overruled, and judgment rendered on the demurrer.

CHUNG YUNE v. SHURTLEFF.

(Circuit Court, D. Oregon. February 13, 1882.)

1. DUTIES—LIMITATION OF ACTION TO RECOVER—NOTICE TO IMPORTER OF DECISION OF SECRETARY.

Under section 2931 of the Revised Statutes the importer is not entitled to notice of the decision of the secretary upon an appeal from the collector, and the limitation of 90 days within which the importer may commence an action under said section to recover duties alleged to have been illegally exacted commences to run from the date of said decision, and not from the time the importer may have knowledge of it.

Action to Recover Duties.

W. Scott Beebe, for plaintiff.

Rufus Mallory, for defendant.

DEADY, D. J. Chung Yune, a Chinese firm of this city, bring this action to recover from defendant, the collector of customs at this port, the sum of \$1,034.84, alleged to have been illegally exacted as the duty upon 372 boxes of sago flour, entered here for consumption.

The importer duly appealed to the secretary of the treasury from the decision of the collector as to whether the goods were dutiable or not, and on September 27, 1881, the secretary affirmed the action of the collector, but the same was not brought to the knowledge of the plaintiff until October 9, 1881. The action was commenced on December 27, 1881, the ninety-first day after the decision of the secretary.

The defendant demurs to the complaint, for that it appears therefrom that the action was not commenced *within* ninety days from the decision of the secretary, as required by statute.

Section 2931 of the Revised Statutes (section 14 of the act of June 30, 1864; 13 St. 214) provides that the decision of the secretary of the treasury, on an appeal from a decision of a collector of customs, "as to the rate and amount of duties to be paid" on merchandise entered at his port, shall be final and conclusive, and such merchandise "shall be liable to duty accordingly, unless suit shall be brought

within 90 days after the decision of the secretary on such appeal for any duties which shall have been paid before the date of such decision."

The plaintiff, admitting as he must that this action was not commenced within 90 days from the decision of the secretary, contends that the statute should be construed as if it read: unless the action shall be commenced within 90 days after the importer has knowledge or notice of such decision.

But this construction would be plainly without the letter of the statute and the apparent intention of congress. The act makes the limitation to commence from the date of the secretary's decision, and is silent as to the knowledge of the party or the effect of his want of notice. The decision of the secretary is a public act in writing, filed in the department, and under the present treasury regulations is communicated to the collector and importer. As a matter of fact, the plaintiff in this case had notice of decision in 12 days from its date, and therefore had 78 days within which to commence suit. In such a case there is no ground to claim that the law has operated hardly, or so as to prevent the plaintiffs from asserting their rights in court by the use of ordinary diligence.

But a case may occur, it is suggested, where, through the negligence of the officials, or other cause, the importer might not learn of the secretary's decision so as to bring his action within the time; yet even then, as said in substance by Mr. Justice Strong in *Westray v. U. S.* 18 Wall. 322, in considering a similar question under the same statute, the court cannot require a notice to be given to the importer to prevent the limitation from running, when congress has not. In that case the court held that the importer was not entitled to notice of the liquidation or estimate of duties on his merchandise by the collector, so as to enable him to take his appeal to the secretary of the treasury within 10 days thereafter, as the statute requires, but that he must get his information on that point for himself.

If any authority is needed in support of this demurrer, beyond the plain provision of the statute, that case appears to be decisive of this. It is true that the importer may learn of the decision of the collector more readily than that of the secretary, if no means are taken to furnish him with either. But the law does not require him to be furnished with notice at all. The department, in the administration of the law, has found it just and convenient to direct that notice be given to the importer of the decision of the officer, but the failure to do so does not affect the legal rights of the parties. Notwith-

standing the want of formal notice of the decision, the importer may immediately sue to recover back the duties alleged to have been illegally exacted, and the limitation upon his right to do so begins to run at the same time. The argument for the demurrer assumes that it was the intention of congress that the importer should have all of 90 days within which to commence his action. But as, in the great majority of cases, one-third of that period is more than sufficient for such purpose, the remaining 60 days must have been given to cover any possible contingencies, such as the getting or receiving notice of the decision of the secretary.

This action not having been commenced within 90 days from the decision of the secretary, it is barred by lapse of time, and the demurrer is therefore sustained.

ULLMAN v. MEYER.*

(Circuit Court, S. D. New York. January 31, 1882.

1. STATUTE OF FRAUDS—PROMISES TO MARRY.

The provision of the statute of frauds requiring all agreements not to be performed within a year to be in writing, applies to promises to marry. The exception in the third section of the statute does not withdraw agreements to marry altogether from its operation.

Motion for New Trial.

WALLACE, D. J. I am constrained to hold that the defendant was erroneously precluded from the benefit of his defence under the statute of frauds on the trial of the action, and that the construction of the statute, which, upon a hasty reading seemed correct, cannot be maintained. The case turns upon the construction of the statute of frauds, the phraseology of which differs from that of the statute of Charles II. It is stated in Parsons on Contracts, (vol. 3, p. 3,) that although provisions substantially similar have been made by the statutes of this country, in no one state is the English statute exactly copied.

It was alleged in the present case, and the evidence tended to show, that by the terms of the agreement of marriage between the parties the marriage was not to take place until some time after the expiration

*Reported by S. Nelson White, Esq., of the New York bar.

of one year. It was held that, by force of the exception in the third section of our statute, promises to marry were not required to be in writing under any circumstances, the view being taken that it was the intention of the statute to withdraw agreements to marry altogether from its operation.

As an original proposition it might be debated whether the statute of frauds was ever intended to apply to agreements to marry. They are agreements of a private and confidential nature, which, in countries where the common law prevails, are usually proved by circumstantial evidence, and at the time the English statute was passed were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them. Nevertheless, at an early day after such actions became cognizable in courts of law the defence of the statute of frauds was interposed, under that clause of the statute which denies a right of action upon any agreement made upon consideration of marriage unless the agreement is in writing; and though it was held that such clause only related to agreement for marriage settlements, there seems to have been no doubt in the minds of the judges that promises to marry were within the general purview of the statute. In our own country, in *Derby v. Phelps*, 2 N. H. 515, the question was directly decided, and it was held that although the defence could not be maintained under the marriage clause of the statute, it was tenable under the clause requiring all agreements not to be performed within a year to be in writing. To the same effect are *Nichols v. Weaver*, 7 Kan. 373, and *Lawrence v. Cooke*, 56 Me. 193.

The question has never been presented in our own state, and the ruling upon the trial was made under the impression that the exception in the third clause of our statute was meaningless, unless intended to relate to all the clauses. It was entirely unnecessary if limited to the particular clause in which it is placed, because by the settled construction of the statute the clause did not apply to the excepted class of promises. 1 Ld. Raym. 387; 1 Strange, 34. When English statutes, such as the statute of frauds, have been adopted into our own legislation, the known and settled construction of these statutes has been considered as silently incorporated into the acts. *Pennock v. Dialogue*, 2 Pet. 1.

A more careful examination has, however, satisfied me that the only purpose of inserting the exception was by way of explanation, and to remove any doubt as to the meaning of the clause by incorporating into it expressly what would otherwise have been left to im-

plication. This conclusion is more reasonable than the supposition that so important an innovation upon the statute of frauds would have been engrafted so ambiguously. If it had been intended to exclude promises of marriage altogether from the operation of the statute, it could have been plainly evinced by inserting the exception where it would naturally apply to all the classes of promises required to be in writing; as it is, it more obviously refers to the marriage clause, and the class of promises covered by that clause. It has no necessary relation to the other classes of promises. While the letters of the parties show a marriage engagement, the terms of the engagement and the time of the marriage are not indicated sufficiently to take the case out of the statute. The evidence offered to show that the promise of the defendant was not, by its terms, to be performed within a year, was sufficient to present a question of fact for the jury.

As this question was withdrawn from their consideration, there must be a new trial.

THIRD NAT. BANK v. HARRISON and another.*

SAME v. SAME.*

(Circuit Court, E. D. Missouri. February 13, 1882.)

1 GAMING LAWS—REV. ST. MO. §§ 5722-3—OPTION DEALS—NEGOTIABLE INSTRUMENTS.

An option deal is not a "gaming or gambling device," within the meaning of the Missouri statutes, and a note given for a balance due on such a deal may be enforced by a *bona fide* holder for value, without notice, if indorsed to him before maturity.

2. NEGOTIABLE INSTRUMENTS—NOTICE.

Where a bank in the absence of a director, by whom a note has been offered for discount, accepts it, and accepts a note payable to him and indorsed to it as collateral, its rights are not affected by such director's knowledge of illegality in the inception of the note accepted as security.

3. SAME—SAME.

An indorsee for value of a promissory note is presumed, in the absence of evidence to the contrary, to have taken it without notice of equities subsisting between the maker and payee.

4. SAME—COLLATERAL SECURITY—DEMAND—BANKING.

Where a bank discounts a demand note for a depositor and receives another negotiable instrument as collateral, the liabilities of parties to the latter are not affected by a failure on the bank's part to make any attempt to collect such demand note when the maker has a sufficient sum on deposit to meet it.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

Motion for a New Trial.

These causes being of a like nature were, by order of court, tried together.

Dyer & Ellis, for plaintiff.

Marshall & Barclay, for defendants.

TREAT, D. J. These causes of action were based on promissory notes executed by Harrison, to the order of Alexander, payable at the Third National Bank. Alexander indorsed and delivered said notes to said bank as collateral to secure a demand note by him to the bank. The indorsement and delivery of said Harrison notes were contemporaneous with the execution, delivery, and discount of the Alexander note under the following agreement:

"\$5,000.

ST. LOUIS, MISSOURI, October 4, 1878.

"On demand, after date, I promise to pay to the order of Third National Bank of St. Louis \$5,000, for value received; negotiable and payable, without defalcation or discount, at the Third National Bank of St. Louis, with interest at the rate of 10 per cent. per annum after maturity; having deposited in said bank as collateral security for this and other loans—

One note, J. W. Harrison, one year, August 28, 1878	\$1,188 29
" " two years, August 28, 1878.....	1,188 29
" " three years, August 28, 1878.....	1,188 29
" N. F. Coffey, sixty days, September 10, 1878.....	1,072 35
" N. F. & J. H. C., sixty days, September 11, 1878.....	1,050 71

—Which ——— hereby authorized said bank, or its president or cashier, to sell without notice at the Merchants' Exchange, in the city of St. Louis, or at public or private sale, at the option of said bank, or of its president or cashier, in case of the non-performance of this promise, applying the proceeds to the payment of notes or evidence of debt held by said bank, including interest, and accounting to ——— for the surplus, if any. In case of deficiency ——— promises to pay to said bank the amount thereof forthwith, after such sale, with interest as above specified. The present cash market value of the above collateral security is ——— dollars; and it is understood and agreed, should there be any depreciation in the value of said security prior to the maturity of any note or claim held by said bank, such an amount of additional security shall be furnished by ——— as will be satisfactory to said Third National Bank; and should such additional security not be furnished within 24 hours after demand on ——— so to do, then and in that event said bank may proceed at once to sell, as above specified, the security herein named.

[Signed]

"CRAIG ALEXANDER."

This agreement represented the transaction between the plaintiff and Alexander in regard to this loan then made. The debt of Craig Alexander to the plaintiff (secured by this agreement) is yet due; only \$500 has been paid on it. Alexander has paid the interest on this loan semi-annually.

The Coffey notes mentioned in this agreement have been renewed from time to time, and renewal notes for that part of the collateral (except \$500 which was paid thereon, and which was the credit mentioned as given Alexander in the main \$5,000 note) are yet current, in possession of the bank, not matured. These renewals of Coffey notes were all made through Alexander; the bank did not see Coffey in the transaction. Alexander would bring in the renewal note and the bank would take it and give up the old note to Alexander. Demand has never been made of Alexander for the payment of the \$5,000 loan. Craig Alexander has been director in plaintiff's bank during the period covered by the dealings mentioned in this case, and is yet such. In the bank it is customary, if a director wants a discount, to have him retire while his paper is being passed on. A memorandum is kept among the bank's papers, for the use of the bank, as receipt of the cashier to the discount clerk. This is numbered 3,470:

"No. 3,470.

THIRD NATIONAL BANK OF ST. LOUIS,
ST. LOUIS, 10—5—1878.

"Craig Alexander has deposited in this bank package containing collat. D. L. \$5,000, subject to ——— order or instruction.

[Signed]

"T. A. STODDARD, Cashier."

The bank had no notice of the transaction out of which the notes grew. Alexander had a large running account at the bank during this time, and was at various times indebted to the bank on general account.

Plaintiff offered in evidence the notes sued on in these cases. Defendant Harrison objected because same are incompetent and irrelevant, and because the pleadings do not deny execution of the notes, and because the notes are void under the Missouri statutes touching gaming and gambling devices. Objections were overruled by the court, to which ruling said defendant excepted at the time. Said notes were then read in evidence as follows:

[Note No. 1.]

"\$1,188.29.

AULLVILLE, MISSOURI, August 28, 1878.

"One year after date I promise to pay, to the order of Craig Alexander, eleven hundred and eighty-eight and twenty-nine one-hundredths dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 8 per cent. per annum. Payable at Third National Bank of St. Louis.

J. W. HARRISON.

[Indorsed:]

"W. Q. HARRISON.

CRAIG ALEXANDER.

[Note No. 2.]

"\$1,188.29.

AULLVILLE, MISSOURI, August 28, 1878.

"Two years after date I promise to pay, to the order of Craig Alexander eleven hundred and eighty-eight and twenty-nine one-hundredths dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 8 per cent. per annum. Payable at Third National Bank of St. Louis.

J. W. HARRISON.

[Indorsed:]

"W. Q. HARRISON. CRAIG ALEXANDER.

[Note No. 3.]

"\$1,188.29.

AULLVILLE, MISSOURI, August 28, 1878.

"Three years after date I promise to pay, to the order of Craig Alexander, eleven hundred and eighty-eight and twenty-nine one-hundredths dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 8 per cent. per annum. Payable at Third National Bank of St. Louis.

J. W. HARRISON.

[Indorsed:]

"W. Q. HARRISON. CRAIG ALEXANDER.

"I hereby waive protest, demand, and notice of protest.

"August 31, 1881.

CRAIG ALEXANDER."

For the purpose of this case it was then announced by counsel that the following facts were to be considered as agreed upon by the parties hereto, and received by court and jury as proved herein. viz.: That the plaintiff has had on deposit on general account, to credit of Craig Alexander, at various times since October 4, 1878, more than the sum of \$6,000; and that plaintiff has had on deposit on general account, to credit of Craig Alexander, at various times since the institution of this suit, more than the sum of \$6,000.

The plaintiff then rested. The defendant Harrison then requested the court to charge the jury as follows: "The court instructs the jury that on the pleadings and evidence herein the plaintiff is not entitled to recover." But the court refused so to charge, to which ruling said defendant then and there excepted. Defendant Harrison then offered to prove the following distinct facts, to-wit:

(1) That each and all of the notes sued on in these cases were originally executed between the maker and the payee, Alexander, for the sole consideration of money won by said Alexander and lost by said defendant Harrison at a game and gambling device known popularly as "option deals."

(2) Said defendant also offered to prove all and singular the facts set up as defences and recited in the answer of defendant Harrison on file in these causes.

But the court refused to admit such evidence, and rejected both said offers of proof as separately made, and to such ruling as to each of said offers the said defendant then and there duly excepted. The

defendant then rested. The court then directed a verdict for the plaintiff in manner and form as found by the jury, to which direction and charge said defendant Harrison excepted at the time. The foregoing was all the evidence given and offered and proceedings had at said trial.

On the foregoing statement it is contended that there was error, because the bank, even if a *bona fide* holder for value, could not exclude from the consideration of the jury the original transactions between the maker and payee of the notes as void under the "gaming laws of Missouri." It may be admitted that as all the parties to these notes are, for legal purposes, resident in Missouri, the contracts are Missouri contracts, and subject to the laws of this state. Said gaming statute is in the following words:

"Sec. 5722. *Bonds, etc., founded on gaming consideration, void.* All judgments, by confession, conveyances, bonds, bills, notes, and securities, when the consideration is money or property won at any game or gambling device, shall be void, and may be set aside and vacated by any court of competent jurisdiction, upon suit brought for that purpose by the person so confessing, giving, entering into, or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser, or other person interested therein.

"Sec. 5723. *Assignment of, shall not affect the defence.* The assignment of any bond, bill, note, judgment, conveyance, or other security shall not affect the defence of the person executing or confessing the same."

This act came under review at an early day by the supreme court of the state of Missouri, when the distinction was sharply drawn between gaming and gambling devices, and mere betting on uncertain events.

Under the statute 9 Anne, c. 14, § 1, it was held (*Bowyer v. Bampton*, 2 Strange, 1155) that notes given for money lost at gaming were void, even in the hands of innocent indorsees for value. To the same effect are *Lowe v. Waller*, 2 Doug. 716; *Lloyd v. Scott*, 4 Pet. 222; *Thompson v. Bowie*, 4 Wall. 463. We have been referred to the following authorities as shedding light on the question: *Chitty*, Bills, 95; *Daniell*, Neg. Inst. § 197; *Ackland v. Pearce*, 2 Camp. 599; *Shillits v. Snee*, 7 Bing. 405; *Henderson v. Benson*, 8 Price, 281; *Chapin v. Dake*, 57 Ill. 296; *Manning v. Manning*, 8 Ala. 138; *Hatch v. Burroughs*, 1 Woods, 439; *Unger v. Boas*, 13 Pa. 601; *Mordecai v. Dawkins*, 9 Rich. (S. C.) 262; *Vallett v. Parker*, 6 Wend. 615; *Weith v. Wilmington*, 68 N. C. 24; *Jordan v. Locke*, Minor, (Ala.) 254; *Stone v. Mitchell*, 7 Ark. 91; *Eagle v. Kohn*, 84 Ill. 292; *Thompson v. Bowie*, 4 Wall. 463.

The principle may be considered well established that when a statute pronounces a gaming or usurious contract absolutely void no recovery can be had thereon. The gaming statute of Missouri destroys the negotiable character of a note, or other obligation, given for a gaming consideration within the terms of that statute. The doctrine that void transactions cannot acquire validity by transfer of paper obligations based thereon finds full sanction not only in authorities, (*supra*,) but in the many bond cases before the United States supreme court. 4 Wall. 463; 102 U. S. 625, 278; 103 U. S. 580; 94 U. S. 429.

The broad distinction remains between contracts void *ab origine*, by force of statutes whereby assignees and indorsees are unprotected, and contracts *contra bonos mores*, which cannot be enforced between the original parties thereto, but are held enforceable when, being negotiable in form, they have passed to innocent holders for value.

The notes in question were, it must be held for the purposes of this motion, given for balances on an "option deal," an illegal contract; being, as alleged, a mere betting transaction on future prices, with no purpose of delivering or receiving the articles concerning which the bet was made. If the allegations of the answer are true Alexander could not recover on the notes in suit; and the court was in doubt whether the position the bank occupies should not be considered as exceptional, and thus open the equities between the original parties. It is evident that the bank could at divers times have collected Alexander's demand note and turned over to him the collaterals; and it seemed that defendants' position had great force, viz., that the transfer of Harrison's notes as collateral to the bank under the circumstances was merely for the purpose of excluding the equities between the original parties. Still the stubborn fact remained that the bank is a *bona fide* holder for value within the rules laid down by the United States supreme court in *Swift v. Tyson* and *Goodman v. Simonds*, no evidence being given that the bank had notice of the infirmity of the paper.

The court holds that the transaction in question is not within the terms of the gaming laws of Missouri, but if it was an option deal, as charged, would be unenforceable between the original parties, and even in the hands of an innocent indorsee for value.

The distinction is so clearly drawn, and the doctrines so exhaustively considered by Judge Thayer, of the St. Louis circuit court, (with whose manuscript opinion in the *Tinsley Case* I have been

avored,) that it would be a mere repetition of what has been thus so ably done, to attempt to travel over the same ground, and hence I quote largely from his opinion as follows:

"The law is now well settled, in all of the states where the question has arisen, that there can be no recovery had upon a contract or sale of personalty where the parties to such contract do not intend an actual delivery of the articles bargained for, but merely intend to settle differences at some future day between the price agreed to be paid for the commodity and the *then* market price. Such contracts are universally held to be invalid, as against public policy, and in some instances they have been held to be in violation of statutes relative to gaming and wagers. *Lyon v. Culbertson*, 83 Ill. 33; *Sampson v. Shaw*, 101 Mass. 145; *Kirkpatrick v. Bonsall*, 72 Pa. 155; *Gregory v. Wendell*, 39 Mich. 337; *Rumsey v. Berry*, 65 Me. 570; *Williams v. Tiedemann*, 6 Mo. App. 269. But there is an apparent conflict of opinion touching the question whether a broker, factor, or commission merchant, who has been employed by his principal to make contracts of this character with some third party, and has done so in his own name, but for his principal's benefit, may maintain an action against his principal to recover money expended for his principal at his principal's request in the settlement of losses accruing under such contracts. This precise question was considered in the *Case of Green*, 15 N. B. R. 201, (U. S. Dist. Court, W. D. Wis.,) and it was there held that the broker could not recover from his principal for moneys thus expended in the settlement of losses on such illegal ventures. But it is to be observed that the court, in the case last cited, based its decision mainly on a statute of Wisconsin, which declared all 'notes and agreements void that had been given for repaying any money knowingly advanced for any betting and gaming at the time of such betting or gaming.' And the evidence in the case cited showed that the broker not only made the illegal contracts in question, but that he advanced the money for the venture. The court accordingly held that the case fell within the statute, and that the broker could not recover money thus knowingly advanced in furtherance of a gambling transaction.

"There are other cases, arising between factors and brokers and their principals, which the courts have apparently treated as though the action was between the principals to the illegal transaction. But the different relation existing between the agent and his principal, in actions by the former to recover moneys expended for his principal in the settlement of losses on wager contracts, was apparently not called to the attention of the court. *Vide Gregory v. Wendell*, *supra*; *Williams v. Tiedemann*, *supra*.

"On the other hand, the law is well settled in England that if a broker be employed to make wager contracts, such as are voidable under 8 & 9 Vict. c. 109, § 18, and at the request of his principal the broker pays the amount due under such contract, *he can recover the amount so paid from his principal*, and the illegal nature of the contract with reference to which the money is paid is no defence to an action founded on such claim. *Warren v. Billings*, 33 Law Jour. (1864,) 55, N. S. Common Law, Michaelmas term, 1863; *Pidgeon v. Burslem*, 3 Exch. 465; *Jessopp v. Surtoryche*, 10 Exch. 614.

"In this country the same doctrine has been held substantially in the following cases: *Lehman v. Strassberger*, 2 Woods, 554; *Warren v. Hewitt*, 45 Ga. 501; *Clark v. Foss*, 10 Chicago Leg. N. 213.

"In the case of *Marshall v. Thurston* the court says. 'We understand the charge of the lower court to be, in substance, that if the broker knowingly assisted the defendant by an advance of money and active agency, though not as principal, to gamble in the rise and fall of bonds, no recovery can be had; but if the broker merely acted as his agent in effecting contracts between him and third parties for the purchase or sale of bonds on time, the defendant and third parties intending to speculate in the rise and fall of prices, and defendant suffered losses which were paid by the broker at defendant's request, or were paid and the payments subsequently ratified by the defendant by executing notes therefor, a recovery can be had. In this view the charge is supported by the authorities.'

"The rule which has the support of the great weight of authority (whatever may be thought of the policy and morality of the rule) seems to be as follows: If a factor, broker, or commission merchant be employed by his principal to buy or sell commodities for the purpose of speculating on the rise and fall of prices merely, and the agent buys or sells in his own name, but on his principal's account, and subsequently, after losses have occurred in such transactions, the agent advances money at his principal's request to pay such losses; or if the agent pay such losses and the principal afterwards executes notes in the agent's favor to cover the amounts so advanced, the agent may recover against his principal the advances so made at his request, or upon the notes so executed, notwithstanding the illegal character of the original venture. The promise implied in the one instance and expressed in the other is neither void for want of consideration nor tainted with illegality. It was even held in the case of the *Planters' Bank v. Union Bank* that where the defendant, in violation of law, had sold bonds for the plaintiff and received the proceeds, the plaintiff might recover the amount from the defendant, and that the illegal character of the transaction out of which the fund arose was no defence.

"But, on the other hand, if a broker or factor supply his principal with funds for the express purpose of enabling him to engage in illegal transactions, and if he (the agent) conducts the illegal venture in his own name, it seems clear that he becomes a *particeps criminis*, and the law will not aid him to recover moneys advanced for such purpose, nor will it enforce securities taken therefor.

"The facts proven in the case at bar seem to bring the case within the principle last stated. The original notes involved in this controversy, of which those in suit were mere renewals, were not given after the various contracts had been settled, to cover losses which the agent had paid for his principal. The notes seem to have been drawn by the principal in favor of his agent at the inception of the alleged illegal ventures, or within a few days thereafter, while the transactions were still pending and the result undetermined. They were either given to secure moneys advanced by the broker to his principal, to enable the latter to prosecute the ventures, or they were given as an indemnity to the broker, to shield him from losses that he might

sustain while carrying out the alleged illegal ventures in his own name, but on his principal's account.

"In either event, it would follow that the agent could not recover on these notes as against his principal, the maker of the notes, if the contracts or 'deals,' as they are termed, were mere wagers on the fluctuations in the market price of grain, and for that reason unlawful. Obligations thus intimately connected with an illegal transaction, and furnishing an inducement to the same, could not be supported as between the original parties, nor could they be enforced by the present plaintiff if it took the same with knowledge of this infirmity.

"I have no difficulty whatever in finding from the evidence that the parties, both principal and agent, had in view mere *wager contracts* upon the price of grain, and that the losses which the agent or broker eventually paid were paid on contracts which, as between the broker and the parties with whom he dealt, were mere bets upon the future market price of wheat, no delivery having been made or contemplated. To find otherwise on the evidence before me would involve a degree of credulity which the court does not possess.

"The case is thus narrowed to the single inquiry whether the plaintiff bought this paper with knowledge that it was not enforceable as between the maker and payee.

"The defendant would charge the plaintiff with knowledge because the payee of the note was one of plaintiff's directors, and *ex officio* a member of the board of discount. The evidence shows, however, that the bank (the plaintiff in this action) had no regular discount committee. The president was authorized to pass upon paper without the advice of the directory. If the directors were present, they gave advice on paper offered for discount. But in the present instance it appears that the originals of the notes now in suit were accepted in the absence of the director. The director states that when he had paper of his own to offer for discount he stayed away from the board, and that he did so in this instance. Upon this state of facts I am clearly of the opinion that the bank cannot be charged with knowledge of facts possessed by the particular director, who was not present and did not act as member of the board when the paper was accepted. The director was himself the payee, and was offering this paper for discount. Whatever contract the bank made in accepting the paper and passing it to the director's credit, was made with the director. He not only *did not assume* to act as agent of the bank in this particular transaction, but he could not lawfully act in that capacity had he so attempted. *Washington Bank v. Lewis*, 22 Pick. 31.

"The present case is widely different from the case of *Bank v. Thomas*, 2 Mo. App. 367, cited for the defendants; for in that case the paper was tendered by a *third party*, and the director, whose knowledge was held to affect the bank, was present at the meeting of the committee on discount, and voted upon the paper in the discharge of his regular duties as a bank officer. In the present case the bank cannot be charged with notice of any infirmity in the paper by any sound rule of law with which I am acquainted. Neither does the court concur in the view that the notes in suit are void in the plaintiff's hands, regardless of the question of notice, by virtue of the provisions of the act respecting gaming. Rev. St. 1879, c. 109.

"In the case of *Hickerson v. Benson*, 8 Mo. 8, it was held in this state that a wager on the result of an election was not within the terms of the statute respecting gaming, although such wagers were against public policy and sound morality, and void on that ground. And such seems to be the correct view with respect to immoral and fictitious sales of grain and other commodities, where *no delivery is intended* by the parties. Such contracts are simply *contra bonos mores*, and the courts will not enforce them, and would not enforce them in the absence of any statute on the subject of gaming. The result is that judgment must be entered on the notes against both of the defendants for the principal and accrued interest."

The petitions aver that the notes were assigned to the plaintiff; and defendant Harrison contends that, therefore, the equities were open. The difference between indorsement and mere assignment is one well known, and the point is well taken, if not cured by what occurred at the trial, and the verdict. See *Daniell*, Neg. Inst. §§ 745, 729, 741; *Hedger v. Lesby*, 9 Barb. 214; *Calder v. Billington*, 15 Me. 398; *Hadden v. Rodkey*, 17 Kan. 429.

The usual form of pleading is, when such is the fact, that the notes were indorsed to plaintiff; for the rights springing therefrom are quite different from those arising from an ordinary assignment. Hence, the defendants' position in that respect is technically correct; but as the notes produced and the evidence showed an indorsement to plaintiff, an amendment would have been allowed if attention had been called to the defect. Consequently, the verdict, under the rulings and proofs, must be held to cure that technical error; or, if need be, permission given to make the pleadings correspond to the evidence and verdict.

As Alexander was a director in the bank it is contended that the bank is, in law, charged with knowledge of what was known to him, and the following cases are referred to in support thereof: *Lemoine v. Bank*, 3 Dill. 49; *Bank v. Davis*, 2 Hill, (N. Y.) 451; *Bank v. Thomas*, 2 Mo. App. 367; *Bank v. Campbell*, 4 Humph. 394; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380.

While the general doctrine is recognized that what an agent knows his principal is charged with notice of, in transactions where said agent is acting for the principal, yet a bond director, in asking for a discount of his own paper, is not an agent of the bank, but acting as the adverse contracting party. Were this held otherwise, no bank could discount paper, to which a director is a party, without losing the position of an innocent indorsee for value under the law merchant. Hence, no bank could have dealings in commercial paper with any

of its directors on ordinary business principles. The opinion of Judge Thayer states the legal aspect of this question very clearly.

It is further contended that inasmuch as Alexander had frequently on deposit, both before and after this suit brought, a sufficient sum of money to pay his demand note, it was the legal duty of the bank to demand payment thereof, and apply his deposits accordingly, thus leaving the collateral discharged of all interest therein by the bank. On this point the court has no difficulty, so far as the legal right of the bank to pursue the collaterals is concerned; yet it would seem that a failure by the bank to take pay for the demand note, and then sue Alexander as indorser of the collaterals, and Harrison, the maker, indicated other than a purpose to collect its demand against Alexander, who was its principal debtor. It had a prompt recourse against him; indeed, had funds in its own hands sufficient to discharge the indebtedness. Why, then, sue him and Harrison, unless its object was, under the formal position of an innocent indorsee for value, to enable Alexander thus to cause a contract to be enforced in his favor which the law would not permit him to enforce in his own name?

It would be easy for the Missouri legislature to destroy, by statute, the negotiability of such paper, but until it has done so the courts must apply the law merchant to its transfer. To what extent inquiry is permissible into the position of parties, as in the case at bar, may be doubtful. The bank can elect its own course by proceeding against Alexander alone on his demand notes, or by enforcing its rights against the collaterals, or possibly by appropriating his deposits to the payment of his indebtedness. While courts should lend no encouragement to betting contracts, yet, so far as the law requires the protection of innocent indorsees of commercial paper, the rules pertaining thereto must be observed. It is obvious that the law may be evaded by giving negotiable notes and having them indorsed to innocent parties; but the remedy is with the legislature. It is said the contract indorsing the collaterals to the bank gave it only the power to sell the same, and not to collect them by ordinary process of law. As indorsee, the right to sue was complete, and the power to sell was an additional advantage which it might or might not exercise. But the question still remains, viz., should not the court have permitted the exact relationship of the parties to these notes to have been developed, to the end that no merely technical screen should be interposed to prevent the defeat of illegal transactions?

The testimony produced, and uncontradicted, proved that the

ordinary course had been pursued as to the transfer of the collaterals, without notice of any defect therein, or of any outstanding equities between maker and payee. Any testimony contradictory thereof, whereby the legal relationship of the parties could be varied, would have been proper; but the contention was that, despite the direct testimony of the cashier, the facts and circumstances indicated that the bank was aiding Alexander to shut out the equities by holding the collaterals, notwithstanding it could have collected the principal or demand note at any time, and thus have released the collaterals. But it was for the bank to continue the demand loan or call it in, as it might determine. It was satisfied with the interest-bearing arrangement, and to take the course which it has done, and which it had the legal right to do. However suspicious the relations of the bank with Alexander may appear as to this point, they cannot overcome the direct and express testimony of the cashier as to the *bona fides* of the indorsements and the consideration therefor.

The motions are overruled.

RALSTON and others, Trustees, etc., v. CRITTENDEN, Governor of the State of Missouri.*

(Circuit Court, W. D. Missouri. February 10, 1882.)

1. ACT OF THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI TO PROVIDE FOR REDUCING THE INDEBTEDNESS OF THE STATE, APPROVED FEBRUARY 20, 1865, CONSTRUED.

Where a state issued coupon bonds to a railroad company as a loan of credit, upon condition that said company should provide for the payment of the interest and principal of such bonds, and upon condition also that the state should have a first mortgage upon said company's road to secure the payment of said bonds and interest; and where the general assembly of said state subsequently provided by statute that in case said company should thereafter issue coupon bonds of a certain description, and should convey its franchises and property, subject to the lien of said state, to trustees, to secure the payment of such bonds and coupons, and such trustees should pay into the state treasury "a sum of money equal in amount to all indebtedness due or owing by said company to the state, and all liability incurred by the state by reason of having issued her bonds and loaned the same to said company, * * * together with all interest that has and may, at the time when such payment shall be made, have accrued and remained unpaid by said company,"—it should be the duty of the governor of the state, upon the fact of such payment being certified to him as therein provided, to assign to said trustees, for the benefit of the holders of said com-

*Reported by B. F. Rex, Esq., of the St. Louis bar.
See 7 Sup. Ct. Rep. 599.

pany's bonds issued as aforesaid, the lien and mortgages held by the state; and where trustees, to whom said company thereafter conveyed its road, etc., subject to said lien, to secure the payment of bonds issued by it, paid into the state treasury, as a payment of all liability due by said company to the state in consequence of said loan of credit, a sum of money equal in amount to the face value of all outstanding bonds issued by the state to said company, and the interest which would come due thereon on the first of the following July, but failed to obtain an assignment of the state's lien, and only received a receipt on account: *Held*, that said state had a right to enforce its lien against said road in case of failure on said company's part to pay when due the interest coupons maturing on the following January; and that said trustees were not entitled, by the terms of said act of 1865, to an assignment of the lien of said state, unless they paid into the treasury of said state a sum equal in amount to the face value of all outstanding bonds issued by said state, as aforesaid, and all outstanding coupons which were, or had been, attached to said bonds, whether *due* or not, together with all other indebtedness due or owing by said company to said state by reason of the latter having issued its bonds, as aforesaid, or paid interest thereon.

2. SAME—ARTICLE 4, § 50, AND ARTICLE 15, § 1 OF THE SCHEDULE OF THE CONSTITUTION OF THE STATE OF MISSOURI, OF 1875, CONSTRUED.

Said act of 1865 was not repealed by the articles of the constitution of the state of Missouri, approved November 30, 1875, by which it is provided that the general assembly shall have no power to release, alienate, or alter the lien held by the state upon any railroad, but that the same shall be in force in accordance with the original terms upon which it was acquired, and that the provisions of all laws inconsistent with said constitution should cease upon its adoption.

Motion for an Injunction.

This was a motion *pendente lite* to restrain Thomas T. Crittenden, governor of the state of Missouri, from selling, or advertising for sale, the Hannibal & St. Joseph Railroad. The facts upon which the motion was based are substantially as follows:

On February 22, 1851, an act was passed by the legislature of Missouri providing for the issue of state bonds, in the sum of one and a half million dollars, to the Hannibal & St. Joseph Railroad Company, as a loan of credit to said company. It was provided in that act that the bonds to be issued shall be redeemable after 20 years from date, bearing 6 per cent. interest, payable semi-annually in New York. They were made payable to the order of and delivered to the company, and transferred by the indorsement of the president thereof. On delivery of the bonds the company should file its certificate of acceptance thereof, in the office of the secretary of state, under its corporate seal and the signature of its president.

The following are the remaining material sections of said act:

"Sec. 4. Each certificate of acceptance so executed and filed as aforesaid shall be recorded in the said office of the secretary of state, and shall thereupon become and be, according to all intents and purposes, a mortgage of the road of the company, executing and filing their acceptance as aforesaid, and every part and section thereof, and its appurtenances, to the people of this state, for

securing the payment of the principal and interest of the sums of money for which such bonds shall, from time to time, be issued and accepted as aforesaid."

"Sec. 9. Each of said companies shall make provision for the punctual redemption of the said bonds so issued as aforesaid to them, respectively, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this state from any advances of money for that purpose; and the tolls and income which shall accrue from the use of their said roads, respectively, when the same or any part thereof shall be constructed, after paying the repairs and the necessary expense of operating the same, and conducting the business thereof, shall be and are hereby pledged for the payment of said interest."

"Sec. 11. In case the said companies, or either of them, to which bonds shall as aforesaid be issued, shall make default in the payment of either interest or principal of the said bonds, or any part thereof, no more bonds shall thereafter be issued to such delinquent company, and it shall be lawful for the Governor to sell their road and its appurtenances, by auction, to the highest bidder, first giving at least six months' notice of the time and place of such sale, by advertisement, to be published once in each week in the paper which shall publish the laws at Jefferson City, and in two public newspapers printed in the city of St. Louis; or to buy in the same at such sale, for the use and benefit of the state, subject to such disposition in respect to such road, or its proceeds, as the legislature may thereafter direct." Legis. Acts 1850-1. p. 265.

Between July 1, 1854, and July 1, 1857, inclusive, bonds to the amount of one and a half million dollars, redeemable in 20 years, were issued and received by the company under the provisions of said act. The coupons were payable January 1st and July 1st of each year. On December 10, 1855, another loan of credit of one and a half million dollars was made to said company on the same terms and conditions as that of 1857.

Under this act of 1855 bonds were issued to the Hannibal & St. Joseph Railroad Company, to run for 30 years, at 6 per cent. interest, payable January and July 1st, as follows: \$500,000, dated November 10, 1856; \$1,000,000, dated February 28, 1857.

On February 20, 1865, the Missouri legislature passed an act, the first section of which is as follows:

"Section 1. The Hannibal & St. Joseph Railroad Company is hereby authorized to issue its bonds, signed by the president and countersigned by the secretary of the company, in sums of \$1,000 each, with coupons attached, bearing interest, payable semi-annually, at the rate of 6 per cent. per annum, and having not less than 10 years to run, and to the amount of three millions of dollars; the payment of the same, with the accruing interest, to be secured by a mortgage or deed of trust, conveying to three trustees to be named therein, by and with appropriate forms of expression, and for the purpose of securing the payment of said bonds and interest, and for no other purpose, on the road of said company, with all its franchises, rolling stock, and appurtenances; subject, however, to all the liens and liabilities existing in favor of the state by virtue of any law of the state at the time said bonds may be issued and delivered."

The remaining sections, so far as material, are set forth in the opinion of the court. The bonds issued under the act of 1851 were renewed, with one exception, under an act passed March 21, 1874, and the renewal bonds will

mature as follows: July 1, 1894, \$500,000; July 1, 1895, \$203,000; January 1, 1896, \$165,000; July 1, 1896, \$614,000; July 1, 1897, \$17,000.

The railroad company did not offer to take advantage of the act of 1865 until April 30, 1881, but on that day it conveyed its property to the complainants, as trustees, to secure an issue of bonds to the amount of \$3,000,000, which bonds the complainants charge were sold in the market, and the proceeds thereof delivered to the state treasurer on June 20, 1881, in payment of all liabilities due by the company to the state in consequence of the aforesaid loan of credit.

It is now claimed by complainants that the \$90,000 was for the purpose of paying the coupons due by the state on July 1, 1881, and that the \$3,000,000 were paid in full discharge of the outstanding bonds and interest thereafter to mature.

The state treasurer accepted the money on June 20, 1881, placing the \$3,000,000 in the treasury, and forwarding the \$90,000 to New York for the purpose of meeting the coupons maturing 10 days thereafter.

The treasurer executed a receipt in the following words, to-wit:

"Received of R. G. Ralston, Heman Dowd, and Oren Root, Jr., trustees of the Hannibal & St. Joseph Railroad Company, the sum of three millions and ninety thousand dollars, on account of the statutory mortgage now held by the state of Missouri against the said railroad.

"P. E. CHAPPELL, State Treasurer."

But said treasurer refused to receipt for said sum as a payment in full compliance with the act of 1865; and also refused to certify to the governor that the requirements of said act had been fully complied with by said trustees. The railroad company failing to pay the interest coupons maturing January 1, 1882, the governor of the state, the defendant, determined to advertise and sell the road because of such default.

The complainants thereupon made said motion for an injunction, claiming that the requirements of said act of 1865 had been fully complied with by them, and that the respondent had therefore no right to sell said road as he had threatened.

The defendant answered that section 50, art. 4, and section 1, art. 15, of the constitution of the state of Missouri, adopted November 30, 1875, had operated to repeal said act of 1865, and that the supreme court of the state had so decided.

Said sections of the constitution of Missouri are respectively as follows:

"The general assembly shall have no power to release or alienate the lien held by the state upon any railroad, or in anywise change the tenor or meaning, or pass any act explanatory thereof, but the same shall be in force in accordance with the original terms upon which it was acquired."

"The provisions of all laws which are inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this constitution as required legislation to enforce them, shall remain in force until the first day of July, 1877, unless sooner amended or repealed by the general assembly."

The opinion of the supreme court referred to was rendered in the case of the *State of Missouri ex rel. v. Chappell, State Treasurer*, which was instituted at the relation of the complainants herein, at the October term, 1881, of said court, asking said court to compel the state treasurer by *mandamus* to execute his certificate in conformity to said act of 1865.

It appears that the supreme court of Missouri refused to grant the *mandamus*, on the ground that said act of 1865 was repealed, as contended, by the constitution of 1875; but it also appears that the question of the *validity* of said act was not raised in said case, either by the pleading or the argument of counsel, and that the only question submitted to the court was as to whether or not the conditions of the act had been fully complied with.

The defendant further contended that the terms of said act of 1865 had not been complied with.

Geo. W. Easley, for complainants.

John T. Dillon, Elihu Root, and Wagner Swayne, of counsel.

D. H. McIntyre, Atty. Gen., for defendant.

Glover & Shepley and Henderson & Shields, of counsel.

In answer to an inquiry at the close of the argument by Mr. Glover, as to when the motion would be decided, MILLER, Justice, said:

We will decide it now, because all three of us are agreed upon so much as is necessary to enable us to make an order refusing this application for an injunction. When that is done, the case remains, anyhow, as it is not here for final decision, and what may come of it hereafter will be seen. The reason why I say we are all agreed that the application for this injunction cannot be sustained is that we do not agree with the complainants' construction of the act of 1865. Looking at the language of the second and third sections of that act, which contain the operative words of the statute, and looking at it with a view to the nicest criticism upon the words themselves, before referring back to the prior legislation and to the general circumstances, we are of opinion that it does not justify the claim of the complainants. The part of the second section which it is necessary to consider reads thus: "Whenever the trustees provided for in the first section of this act shall pay into the treasury of the state a sum of money equal in amount to all indebtedness due or owing by said company to the state, and all liabilities incurred by the state by reason of having issued her bonds and loaned the same to said company as a loan of the credit of the state, together with all interest that has, and may at the time when such payment shall be made have, accrued and remain unpaid by said company, and such fact shall have been

certified to the governor of the state by the treasurer," the governor shall assign this statutory lien.

The object of this bill is to procure an assignment of the statutory lien, because the complainants say they have complied with the requirements that I have just read. It is their contention that when they paid the \$3,000,000, which was the principal of all the bonds that the state was liable for on account of the Hannibal & St. Joseph Railroad, and had paid the instalment of interest then just due and accrued, they had complied with this statute. Whatever opinion they may entertain now, that is certainly all they have done, and all they claim to have done. They do not claim that they have done anything more to relieve, remove, or discharge any other liability that the state may be under on account of those bonds.

Now, looking at the language of the statute critically, let us see if there are any other liabilities of the state on account of those bonds which these complainants ought to have extinguished or provided for before they could make this demand. The statute seems to have been drawn with a great deal of care; it seems to have been drawn by a man who evidently knew how to use words, for he uses them well; and applying the well-known rule, that every word in a statute, and especially in the important part of it, like this, ought to have a meaning, and a distinct meaning, if there is a place for it, we come to this: What is it they are to do? They are to "pay into the treasury of the state a sum of money equal in amount to all the indebtedness due or owing" to the state. There has been no comment here on those two phrases. It is obvious they have a different meaning. A man may owe \$10,000,000 and not a dollar of it may be due. It may be 10 years before a dollar of it is due, or before a cent of interest is due upon it, because if the interest falls due at odd times it is only by an express provision and not an implied one; therefore the drawer of this bill said: "All indebtedness due," that has to be paid; "all indebtedness owing," that has to be paid; and then "all liabilities incurred by the state by reason of having issued her bonds." It is my opinion that the interest was owing as much as the principal. I do not know but what that would have been the case if it had merely read, like an ordinary bond, that the state agreed to pay the bond and interest at the rate of 6 per cent., payable annually. I do not know but what all of the interest up to the end of the time the bonds ran would be held to be owing in that case. But, whether that be so or not, I am very sure that when the bond issued has a separate

obligation for each one of these instalments of interest,—a kind of obligation which our court has held, and which all courts now hold, is capable of a distinct suit, and is so far a separate obligation,—that the statute of limitations applicable to the bond is not applicable to the coupon, but begins to run against the coupon, according to its nature, from the time it falls due, and not against the bond. I say that when the governor of the state of Missouri had out so many of these pieces of paper, they were each an item of debt owing at the time this transaction occurred. They need not resort to the word “liabilities;” but, perhaps, to make that which might have been clear a little clearer, and to prevent any mistake whatever, they use a word that covers everything. Whatever the state had become liable for under her issue of those bonds was to be paid by a sum of money equal to it, if paid in money, before the right to the assignment of the statutory lien accrued; and this has not been done.

This view of the matter receives illustration from another clause. By the third section of the act of 1865, the complainants can entitle themselves to receive this assignment without paying a dollar in money to the governor or into the state treasury. That was an obligation which had its condition, and it throws light upon what the other was, when a sum of money equal to so and so was to be paid. And what is that obligation? “The treasurer of the state is hereby authorized and directed to receive of the trustees aforesaid, in payment of the \$3,000,000 and interest”—that has to be paid—“as provided in the second section of this act;” that is as much as to say: “By section 2 of this act we did provide that for the payment of \$3,000,000 and interest the treasurer might receive any of the outstanding bonds of the state bearing not less than 6 per cent. interest, or of the unpaid coupons thereof at their par value.” He not only could receive the bonds, but you might go round, if it would do you any good, and buy up these coupons and pay the debt in that way. At all events, it is quite clear, taking those two sections together, that the legislature intended that the coupons to the bonds were to be provided for as well as the bonds themselves. That view of it is confirmed also by the original act of 1851. The fifth section of that act is: “The said bonds thus issued to the Pacific Railroad Company shall be denominated ‘Pacific Railroad state bonds,’ and the said bonds thus issued to the Hannibal & St. Joseph Railroad Company shall be denominated ‘The Hannibal & St. Joseph Railroad state bonds;’ and the faith and credit of this state are hereby pledged for

the payment of the interest"—interest being mentioned first—"and the redemption of the principal thereof." Now, that was an obligation which the state assumed in the original act, that she would pay the interest and redeem the principal. Section 9 says:

"Each of said companies shall make provisions for the punctual redemption of the said bonds so issued as aforesaid to them, respectively, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this state from any advances of money for that purpose."

The state obliged herself to pay the interest, and she also obliged the Hannibal & St. Joe Railroad Company to pay the interest which should accrue thereon; not only what the state had paid, but "in such manner as to exonerate the treasury of the state from any advances of money for that purpose."

Can we believe that when the act of 1865 came to be passed by the state it intended anything less than this? Can we believe that it intended to modify that principle as to what should be paid, what should be secured, or how she should be indemnified; that it intended to make it any less strong or secure than it was; or that any less should be demanded or paid than was required by the act of 1851? On the contrary, the very language which I have read and undertaken to criticise attempts to make more. It says all indebtedness which is due, which is owing, and all liability. It has added other words distributively to enforce the principle that the state is to lose nothing; that she is to suffer nothing; that whenever you come in and want to get rid of this statutory mortgage, or, rather, have it turned over to you, (for you do not merely get rid of it—you keep it alive to have it turned over to you,) you are to do certainly as much as was required by the act of 1851, and if anything had occurred since that requiring you to do more, you are to do it. It says, "all liabilities."

I have no question, and neither have my brethren on the bench, that that is the true and sound construction of the act of 1865, and inasmuch as that has not been done, the power vested in the governor by the original act of 1851, to sell on default of interest, remains.

It is said, however, that since the state has accepted the principal, and the amount of interest that may be yet due by these trustees or the railroad company, or the obligation that may yet rest on them, is uncertain, and has not yet been ascertained, we must, by injunction, restrain the governor from selling. That is a misapplication of the

doctrine on that subject. The governor is endeavoring now to enforce the payment of a sum which is ascertained and well known. It is the last past-due instalment of interest, which amounts to \$90,000, I suppose. There is no difficulty about it. If you want to pay it, well and good; if you do not, the governor has a right to sell. What will happen after the sale it will be time enough to consider then. You can prevent it. If you want your road, go and pay this \$90,000,—that is, by saving the state from the obligation of paying it; or, if the state has paid it, by repaying it to her; and when that is done, if this particular proceeding is not stopped by the governor, we will stop it. But I have no idea that there will be any occasion for a resort to that. The governor will never want to do any more than make you pay this interest as it accrues, and save the state harmless.

Perhaps I ought to stop there, because that decides the motion before us, and I may not be here if the case ever comes up on anything else. But I think it not inappropriate to make a remark or two further, with a view of seeing if the state and the complainants can not be brought together in such a manner as to prevent a great and unnecessary loss—a loss which might be prevented if each party would do what there is some moral obligation to do; and in some respects, I will say, what there may be a legal obligation to do. I am of opinion that the decision of the supreme court of the state does not preclude us from holding the act of 1865 valid, in the view that we take of it, whatever it might be if it was construed as complainants say it should be. I am of opinion, therefore, that the act of 1865 is a subsisting, valid act, and a rule of moral and legal obligation for the state and for these parties complainant. I am also of the opinion that the state having accepted, or got this money into her possession, is under a moral obligation (and I do not pretend to commit anybody as to how far its legal obligation goes) to so use that money as, so far as possible, to protect the parties who have paid it against the loss of the interest which it might accumulate, and which would go to extinguish the interest on the state's obligations. I am of opinion, also, that it is the duty of these gentlemen, if they further seek to get the benefit of this statutory lien, to indemnify the state absolutely against any loss that may accrue on account of the unpaid interest on these three millions of bonds.

I do not know that I ought to say anything about the particular manner in which that should be done. I think I am quite safe in saying that if they will go and purchase up and get cut off of any 6 per cent. bonds of the state of Missouri as many coupons as will

amount to the coupons on these \$3,000,000 and present them to the governor, they ought to have the assignment of this statutory lien. Of course, many of these coupons having a long time to run, you can buy at a discount. It would not be, as some counsel say, as if all this sum were due now. Much of this is only due along through future periods. I might make a few observations as to the manner in which the parties could get together and do right as between themselves. I think the honor of the state of Missouri will make her do as nearly right as possible, and if the parties complainant accept this opinion—and if they do not they can appeal after a final decree—I hope they and the respondent will be brought together so that the equitable principle which is involved in the act of 1855, (which I still think is in existence,) that the state should be fully indemnified and these parties made to lose as little as possible, will govern the case. The motion for an injunction is overruled.

HARRIS and another v. HESS and another.*

(Circuit Court, S. D. New York. January 27, 1882.)

1. PRACTICE—INTERPLEADER—DEPOSIT OF AMOUNT CLAIMED.

The provision of section 820 of the New York Code of Civil Procedure, whereby a defendant against whom an action upon contract is pending may, before answer, upon proof that a person, not a party to the action, makes a demand against him for the same debt, be discharged from liability to either by paying into court the amount of the debt, has been adopted into the practice of the United States courts for the districts of New York, under section 914 of the Revised Statutes of the United States.

2. SAME—JURISDICTION—SUBSEQUENT ACTION IN STATE COURT.

The jurisdiction of a United States court in an action pending in it, after notice of motion by defendant for an order to substitute as defendant a person making a demand for the same debt as that sued for in the action, and to release the defendant, upon his paying into court the amount of the debt, from liability to either that person or the plaintiff, cannot be affected by a subsequent action brought in a state court by such person against the defendant.

James S. Stearns, for plaintiffs.

Lauterbach & Spingarn, for defendants.

Moore, Low & Sanford, for Hanover Bank.

BLATCHFORD, C. J. The defendants, on behalf of the plaintiffs, sold to the Hanover National Bank a promissory note, not overdue,

*Reported by S. Nelson White, Esq., of the New York bar.

and received from that bank the purchase price, and delivered the note to the bank. The defendants gave to the plaintiffs a check on a bank for the proceeds of the note, less \$3.77 commission. Before the check was presented to the bank or paid, the Hanover Bank, having ascertained that when the note was sold the makers of it, a firm in New Orleans, had suspended payment, notified the defendants of the fact, and tendered the note back to them, and demanded back the purchase money. Thereupon the defendants stopped the payment of the check. The plaintiffs, citizens of Pennsylvania, then brought this suit in this court against the defendants, citizens of New York. The Hanover National Bank appears by the papers to be a corporation doing business in the city of New York, and having its place of business in that city, and to be a banking association created by and under the laws of the United States. It is, therefore, to be regarded as a citizen of New York. This suit is a suit on the check which the defendants gave to the plaintiffs, and the amount sought to be recovered is \$1,486.41, with interest from November 29, 1881. The amount of the claim of the Hanover Bank against the defendants is \$1,490.18, with interest from November 30, 1881. This suit was commenced December 19, 1881.

It is provided, by section 820 of the New York Code of Civil Procedure, that a defendant, against whom an action to recover upon a contract is pending, may, at any time before answer, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt; and that the court may, in its discretion, make such an order. This is a proceeding in a suit at law to substitute one defendant for another. It is a proceeding adopted by section 914 of the Revised Statutes. The defendants, before answer, served on the Hanover Bank and on the attorney for the plaintiffs, on the tenth of January, 1882, the proper papers, with notice of an application to be made to this court on the thirteenth of January to substitute the Hanover Bank in the place of the defendants, and to discharge the defendants from liability to either the plaintiffs or the Hanover Bank concerning the claim or debt mentioned in the complaint herein, on the defendants paying into this court \$1,486.41. The application was adjourned by consent from January 13th to January 20th, and was made on the latter day. On January 19th or 20th the Hanover Bank

commenced a suit against the defendants in a court of this state to recover the said \$1,490.18, with interest from November 30, 1881. The defendants are willing to pay into court \$1,490.18, with interest from November 29, 1881. Both the plaintiffs and the Hanover Bank oppose the application.

The defendants have the money which they received from the Hanover Bank. It is claimed by each of the two parties. It is claimed directly by the Hanover Bank as the money which it paid to the defendants; and, although the suit in this court is brought on the check, yet it is really a suit to recover the money which the Hanover Bank paid to the defendants as being the money of the plaintiffs. The plaintiffs can be in no better position, as regards the real transaction, than if no check had been given. The check was given under a mistake of fact. The rights of the plaintiffs as against the money and the defendants, and as against the claim of the Hanover Bank to the money, are no different now from what they would be in a suit by the Hanover Bank against the plaintiffs to recover back from them money paid by the plaintiffs to them directly as the purchase price of the note. Whether the plaintiffs or the Hanover Bank have the better right to the money is a question not to be settled on this application. The defendants are not questioning the title of the plaintiffs to the note; and, as to the money, the defendants are mere stakeholders.

The case is clearly one within the state statute. The application has relation back to the time when notice of making it was served, and the bringing of the suit in the state court subsequently by the Hanover Bank cannot affect the jurisdiction of this court to grant the application. It is granted, and the order to be made will be made *nunc pro tunc*, as of the day for which the application was first noticed. The amount to be deposited in court will be \$1,490.18, with interest from November 29, 1881.

ANDERSON v. SHAFFER.*

(Circuit Court, S. D. Ohio, E. D. December, 1881.)

1. ATTACHMENTS—SECTION 915, REV. ST.—CONSTRUCTIVE SERVICE.

Under section 915, Rev. St., in actions for the recovery of money only, the United States courts are authorized to issue attachment and garnishee process **only where the court has acquired jurisdiction of the person of the defendant. As to what effect the adoption by the court, by general rules, of the attachment laws of the state in which it is held would have, where such laws authorized constructive service in such cases, *quere*.**

2. SAME—SECTIONS 739, 915, REV. ST.—CASE STATED.

In an action for the recovery of money only, on a promissory note, commenced in the southern district of Ohio, by a resident of that state, against a resident of the state of Texas, the defendant not having been found and served within the district, but the petition alleged that the defendant had property and credits within the districts, and attachment and garnishments were issued therein, *held*, (1) that under section 739, Rev. St., the action could not be maintained in that district; and (2) that under section 915 the court had no power to issue attachments or garnish *nts*.

Motion to Dismiss Attachment.

Harrison, Olds & Marsh, for defendant.

F. W. Wood, for plaintiff.

SWING, D. J. The record shows that on the sixteenth day of July, 1881, the plaintiff filed his petition in this court alleging that he was a citizen of the United States, and of the eastern division of the southern district of Ohio; that the defendant, on the fifteenth day of October, 1877, at Kansas City, in the state of Missouri, made his promissory note, and delivered the same to Susan E. Wagenhols, and thereby promised to pay said Susan E. Wagenhols, or order, \$2,000, with interest from date at the rate of 8 per cent. per annum; that afterwards, and before the maturity of the note, the said Susan E. Wagenhols, for a valuable consideration, indorsed the same, and transferred it to the plaintiff, who is now the legal holder and owner thereof, and sets out a copy of the note, with the indorsements thereon; that the note is now due and unpaid; that said defendant has property and rights in action in the eastern division of the southern district of Ohio which the plaintiff seeks to seize by attachment, and subject to the payment of his claim; and plaintiff asks judgment on said note against the defendant for \$2,000 and interest.

On the sixteenth day of July, 1881, a summons was issued upon the petition, directed to the marshal, commanding him "to summon

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

Frank W. Shaffer, citizen of and resident in the state of Texas, if he be found in your district." This summons was afterwards returned by the marshal with the following indorsement: "I received this writ at Columbus, 12 noon, July 22, 1881, and have been unable to find Frank W. Shaffer." The return of the marshal was filed on the eighteenth day of August, 1881.

On the sixteenth day of July, 1881, upon affidavit filed, there was issued out of said court attachment and garnishee process against the Fairfield County Bank, Peters & Traut, Charles Frederick Shaffer, administrator, and Charles F. Shaffer, requiring them to appear and answer touching the money, property, or credits in their possession or control. All these were served by the marshal on the parties on the twenty-second of July, 1881, and filed August 18, 1881.

Afterwards Charles F. Shaffer filed his motion to discharge and dismiss the attachment and garnishee process, on the ground that the court had no jurisdiction. The record in this case shows that the defendant was a citizen of Texas, and it further shows that he was not found and served within this district; clearly, therefore, under the provisions of section 739, this action could not be brought and maintained against the defendant in this district. This being so, can the attachment and garnishee process be maintained against the property of the defendant under and by virtue of the provisions of section 915, U. S. Statutes? Whether if the circuit court of this district had adopted by general rules the attachment laws of the state of Ohio we could maintain jurisdiction, is not necessary to consider, as no such rule has been promulgated. Without entering into any discussion or analysis of the provisions of this section, I am of the opinion that it authorizes an attachment in those cases only where the court has acquired jurisdiction of the person of the defendant. *Chittenden's Case*, 2 Woods, 437; *Saddler v. Hudson*, 2 Curtis, 6; *Nazro v. Cragin*, 3 Dillon, 474; *Levy v. Fitzpatrick*, 15 Pet. 171; *Toland v. Sprague*, 12 Pet. 300; *Ex parte Ry. Co.* 103 U. S. 794.

The motion to dismiss the attachment proceedings must therefore be granted.

FISHER v. MEYER and others.*

(*Circuit Court, S. D. New York. February 1, 1882.*)

1. PRACTICE—STAY OF PROCEEDINGS—SECURITY FOR JUDGMENT.

Where defendants, solvent but engaged in active business, moved, after verdict, for a stay of proceedings during the time allowed for making a case, security required under the circumstances as a condition for the granting of such stay.

Motion for Stay of Proceedings.

SHIPMAN, D. J. The motion is not opposed by the plaintiff, but he insists that it should be granted upon terms; *i. e.*, inasmuch as the plaintiff has now no security, that security should be given for the payment of the judgment, if one is rendered. The verdict amounts to a very large sum, *viz.*, about \$181,000. The defendants are probably now of ample means to pay all their liabilities, but they are in active business, and whether they will be able to pay their debts at the expiration of some months, in case judgment is entered against them, depends upon contingencies which cannot now be ascertained and made certain. They are now able to give security, and no serious hardships will be imposed thereby. If no security is given, a large claim is placed at some hazard. In the case of so large a verdict against parties who are subject to the vicissitudes of business, I think that the plaintiff is entitled to security.

The motion of the defendants for a stay is granted, provided they shall give bond, with two sureties, to the satisfaction of the court, in the sum of \$200,000, conditioned for the payment to the plaintiff of any judgment which may be rendered against them in this suit, or for the satisfaction of said judgment. In case a writ of error shall be taken to the supreme court, this bond can be vacated, and the bond required by section 1000 upon writs of error will be given.

*Reported by S. Nelson White, Esq., of the New York bar.

DOYLE v. UNITED STATES.

(Circuit Court, N. D. Illinois. December 5, 1881.)

1. CRIMINAL PRACTICE—COMMUNICATIONS FROM THE JUDGE TO THE JURY.

Though it is an irregularity in a judge to communicate privately with one of the jurors while they are deliberating upon their verdict, yet such irregularity furnishes no sufficient ground for reversal, where it is not clear that it worked, of necessity, a prejudice to the plaintiff in error.

2. SAME—SEALED VERDICTS.

Under the practice of this district, where it is agreed, in a criminal case, that a verdict may be signed and sealed by the jurors and delivered in court, and they are required to meet the court when it again convenes, it is the right of the defendant to have the jury present in court when the verdict is opened.

On Error to the District Court.

Bangs & Kirkland, for plaintiff in error.

I. The court erred in privately communicating with one of the jurors while they were deliberating upon their verdict. Whart. Cr. Pr. (8th Ed.) §§ 714, 830; 2 Grah. & Wat., New Trials, 360; *State v. Alexander*, 66 Mo. 148; *Sargent v. Roberts*, 1 Pick. 341; *State v. Patterson*, 45 Vt. 308; *Taylor v. State*, 42 Texas, 504.

Authorities to the next point also cited.

II. The court erred in denying the defendant's motion to have the jury polled. 3 Bl. Com. 377; 10 Bac. Abr. tit. "Verdict, B;," 1 Bish. Crim. Proc. § 1002; *Lawrence v. Stearns*, 11 Pick. 501; *U. S. v. Potter*, 6 McLean, 188, 189; *Nomaque v. People*, Breese, 145; *Root v. Sherwood*, 6 Johns. 68; *Riggs v. Cook*, 4 Gilm. 352; *Sargent v. State*, 11 Ohio, 473; *Sutliff v. Gilbert*, 8 Ohio, 408; *State v. Engles*, 13 Ohio, 490; *U. S. v. Bennett*, 16 Blatchf. 374; *Martin v. Morelock*, 32 Ill. 485; *Reens v. People*, 30 Ill. 256; *Crotty v. Wyatt*, 3 Bradw. 388; *Price v. State*, 38 Miss. 531; *Woner v. N. Y. C. R. Co.* 52 N. Y. 437; *Goodwin v. Appleton*, 22 Me. 456.

Joseph B. Leake, U. S. Atty., for defendant in error.

I. The defendant had no common-law right to poll the jury. *Com. v. Roby*, 12 Pick. 496, 511; *Martin v. Maverick*, 1 McCord, 24; *State v. Allen*, Id. 525. In civil cases. *Beal v. Hall*, 22 Ga. 431.

II. It has never been the practice in the federal courts. *Dunlap v. Monroe*, 1 Cranch, 536; *U. S. v. Anthony*, 11 Blatchf. 209; *U. S. v. Bridges*, 10 Cent. Law J. 7.

DRUMMOND, C. J., (*orally*.) At the last May term of the district court the plaintiff in error was tried on an indictment for passing false and forged bonds of the United States, knowing them to be forged. He was found guilty by the jury, and a motion for a new trial was made and overruled, and sentence of imprisonment passed

upon him by the court. The case was given to the jury under instructions from the court on the afternoon of the third of June. On the morning of the fourth, before they had agreed upon a verdict, and while the jury were together in their room having it under consideration, the judge who tried the cause received, by the hand of the bailiff in charge of the jury, from one of the jurors, the following communication: "Has there been any evidence as to Doyle's knowledge that these bonds were forged, and can a person be convicted without positive evidence as to his guilt?" To which communication the judge caused to be delivered, by the hand of the bailiff to the juror, his answer written upon the back of the communication as follows: "The jury are to determine, from all the evidence in the case, whether the defendant knew these bonds to be forged. If the circumstances are such as to satisfy you beyond a natural and reasonable doubt of defendant's guilt, then you should so find; otherwise, you should acquit. Please preserve this."

There is nothing in the record to show whether the juror wrote this communication and addressed it to the judge of his own motion or at the instance of other members of the jury. Neither does it affirmatively appear that the answer of the judge was made known to any of the jurors. The communication and the answer were made and received, as stated above, not in open court, the court in fact not being in session on the fourth of June, nor in the presence nor with the knowledge or consent of the plaintiff in error or his attorney. The answer of the judge to the communication of the juror, under the circumstances stated, is assigned for error on the record.

After the case was submitted to the jury by the court, the plaintiff in error and his attorney consented that when the jury had agreed upon a verdict they might sign and seal the same, and if the court was not then in session they might hand it to the officer in charge of the jury to deliver to the clerk, and that the jury might then disperse *to meet the court when it should again convene*, and thereupon the court on Friday, June 3d, adjourned, and did not again meet until Monday morning, June 6th. On the opening of the court then, the jury not being present in their seats, nor having been called in the cause, the court addressed the clerk and asked if he had the verdict, whereupon the clerk replied that he had such verdict, and produced a sealed envelope from which he took a paper writing which he then read in open court as follows: "We, the jury, find the defendant, James B. Doyle, guilty, and recommend him to the mercy of the court." Which verdict was signed by all the jurors and duly recorded. At the time

this paper was read in court no objection was made by the plaintiff in error or his counsel to the opening of the sealed envelope, nor to the reading of the verdict, but the counsel moved the court to have the jury polled, which motion the court overruled and refused to allow the jury to be polled. This action of the court in thus receiving this paper writing as the verdict of the jury and refusing to allow the jury to be polled is also assigned for error.

It is unnecessary to consider the various other errors assigned, as not much reliance was placed upon them by the counsel, and as, I think, they are untenable. There can be no doubt that the communication of the judge to the jury was irregular and objectionable. The instructions of the judge ought always to be in open court, in the presence of all the jurors and of the defendant. It is true that in cases of protracted deliberation by the jury it is sometimes difficult and inconvenient to observe this rule; and yet it is important that it should be followed, not that where it may be violated the fact would necessarily oblige an appellate court to reverse a conviction, but because there is always so much danger in giving these private instructions not open to the observation of counsel or of the parties. If there is nothing in instructions thus privately given prejudicial to the defendant, then an appellate court would not, perhaps, reverse. It is probable that the judge in this case may have inferred that the communication addressed to him was sent by the foreman, or at the instance of all the jury; and there was nothing objectionable in the law as laid down by the judge; and, indeed, the judge had already given substantially the same instructions to the jury in open court. It was, no doubt, inadvertently done, and nothing wrong was intended on his part, as is manifest from the memorandum he added to his answer, requesting that it might be preserved for the purpose of being subject to examination and criticism if the law warranted it. I doubt whether I should reverse this case merely in consequence of this irregularity of the judge, because I think it is not clear that it necessarily worked any prejudice to the plaintiff in error.

On the second point, numerous authorities have been cited by the counsel for the plaintiff in error to show that the right exists on the part of a defendant in a criminal case always to poll the jury, whether the verdict be rendered in open court, or by being sealed under the direction of the court or with the consent of the parties. There can be no doubt that in most of the states, including Illinois, it is decided that it is the absolute right of a defendant in a criminal case, both upon an open verdict rendered in court and a sealed ver-

dict, to poll the jury. But it seems to be a right which has grown up as a matter of practice. It was not a right which existed at common law. *The court* always had the right to poll the jury, and if a different verdict was rendered from that which was delivered privily to the judge, or which was first rendered in court, the court had authority to punish those jurors who dissented from the verdict. In some of the states the right of a defendant in a criminal case to poll the jury is denied. In the federal court in this district the practice has been not to allow a defendant, as of right, to poll the jury when he has agreed that a verdict may be signed and sealed by the jurors and delivered in court. If this were a question merely of polling the jury, under this practice I should not feel inclined to disturb the sentence of the court. For example, if the jury had been allowed to separate upon the understanding and agreement that they were not again to meet the court, in such case it would seem as though the right to poll the jury had necessarily been waived. But in this case they were required to meet the court when it again convened, and the necessary construction to be given to this is that the jury should be present in court when the verdict was opened. They had formed their verdict and sealed it in the place of their deliberations. They had handed it to the officer to be delivered to the clerk. It was the right of the defendant, under the circumstances, to have the jury present in court when the verdict was opened, in order that they might know that the verdict on which they had agreed and signed was delivered in court to be entered of record. In states where the jury is not permitted to be polled, the practice has always been to require the jury to be present upon the delivery of a sealed verdict. In the case decided in the federal court in the district of Alabama, (*U. S. v. Bridges*, 10 Cent. L. J. 7,) where the court refused to allow the jury to be polled, the case shows that the jury were all present when the verdict was opened and read in court. In all cases, it is true, what gives effect to the verdict of the jury is that it is delivered or opened and read in court, and then recorded. It thereby becomes the act of the court. The record in this case does not show that the jury were present when the verdict was opened in court, and as it does not appear that the plaintiff in error waived his right to have the jury present when the sealed verdict was opened, for that reason the sentence and judgment of the district court will be reversed.

The counsel for the plaintiff in error has also made a motion to discharge him from the accusation against him in the indictment because he has once been tried before a jury, and no valid verdict has

been rendered; and it is insisted that to try him again will be to put him twice in jeopardy, contrary to the provisions of the constitution. That motion I shall overrule. He consented to receive a sealed verdict; that verdict was received, not under circumstances to make it such a verdict as to warrant an appellate court in sustaining a conviction upon it, but it cannot be regarded as placing the plaintiff in error twice in jeopardy because he has to be tried again. There was not the regularity upon which he had a right to insist in this verdict; but the government, I think, has the right to claim that he shall be tried again; and the only effect of the reversal of the action of the district court will be that a new jury must come to try the indictment, and, as the counsel agree that the trial may be in this court, it will be so ordered. Section 3, act March 3, 1879.

NOTE.

IRREGULAR COMMUNICATIONS FROM COURT. That all communications with the jury should be in open court, in presence of counsel, is well settled: *Sargent v. Roberts*, 1 Pick. 337; *Com. v. Ricketson*, 5 Metc. (Mass.) 412; *Hall v. State*, 8 Ind. 439; *O'Connor v. Guthrie*, 11 Iowa, 80; *Hoberg v. State*, 3 Minn. 262; *Crawford v. State*, 12 Ga. 142; *State v. Frisby*, 19 La. Ann. 143; *State v. Alexander*, 66 Mo. 148; *Witt v. State*, 5 Cold. (Tenn.) 11; *Taylor v. State*, 42 Tex. 504; *Holton v. State*, 2 Fla. 476; *State v. Ladd*, 40 La. Ann. 271.

To receive a communication from the court they should be brought into court as a body: *Fisher v. People*, 23 Ill. 283. See, as to practice, *Hulse v. State*, 35 Ohio St. 421; *Buntin v. State*, 68 Ind. 38. The presumption is that communications made by the court to the jury, in contravention of these rules, are important, until the contrary is proved, though, if manifestly trivial, they will be regarded as giving no ground for revision; but if *prima facie* material, it must be shown, in order to meet exceptions taken to their delivery, that they were actually and necessarily inoperative, as when they consist merely in a reference to a charge already made in the presence of counsel on both sides in open court. See *Redman v. Gulnac*, 5 Cal. 148. Even a designation of particular statutes is a communication which, if made privately, may vitiate a verdict: *State v. Patterson*, 45 Vt. 308; see Proffat, *Jury Trial*, § 348. And so of a reference by the judge to a prior charge by him to the grand jury: *Holton v. State*, 2 Fla. 476. And of the reading by the jury of an imperfect report of the judge's charge to themselves: *Farrer v. State*, 2 Ohio St. 54.

But the inadvertent discovery by the jury, among the papers left in the court-room when they were deliberating, of the judge's notes, will not set aside a verdict when it appears that either the notes were not read, or, if read, they could have had no legitimate effect on the jury: *Chapman v. Railroad*, 26 Wis. 295. And mere trivial communications cannot be regarded as having any effect: *Hall v. State*, 8 Ind. 439. This has been held to be the case where the judge returned an application for further instructions without reply,

directing the officer to hand a volume of reports to the foreman, and requesting him to read a decision to the effect that the judge can only communicate with the jury in open court: *Com. v. Jenkins*, Thach. Crim. Cas. 118. And so where a case, as to the importance of jurors harmonizing, was sent to the jury: *State v. Pike*, 65 Me. 111; and where a part of the evidence was read by the court to the jury in the absence of the defendant and his counsel: *Jackson v. Com.* 19 Grat. 656.

POLLING JURY. In civil cases the polling of a jury is generally conceded to be at the discretion of the court: Proffat, *Jury Trials*; *Byrne v. Grossman*, 65 Pa. St. 310. In Massachusetts it is held to be discretionary with the court in criminal as well as in civil cases to grant an application for polling: *Com. v. Roby*, 12 Pick. 496; *Com. v. Costley*, 118 Mass. 1. The practice in New England is only to grant the application when there is some ground laid, and the assent of the jury individually to the appeal of the clerk, "and so you say all," is regarded as giving a sufficient assurance of the assent of all the jurors: *Fellow's Case*, 5 Greenl. 333. In several jurisdictions, however, it is held that the defendant has a right to have the polling ordered: *U. S. v. Potter*, 6 McLean, 182; *People v. Perkins*, 1 Wend. 91; *Fox v. Smith*, 3 Cow. 23; *Sargent v. State*, 11 Ohio, 472; *Wright v. State*, 11 Ind. 569; *State v. Austin*, 6 Wis. 205; *Nornague v. People*, 1 Breese, 111; *State v. John*, 8 Ired. 330; *State v. Young*, 77 N. C. 498; *State v. Allen*, 1 McC. 525; *Tilton v. State*, 52 Ga. 478.

But where the jury have been called upon to indicate their approval of the verdict as given by the foreman, and where they have given their assent, polling is an unnecessary cumulation of form. It should only, as principle, be required either (1) when there is no such distinctive appeal to the body of the jury as is the case when the clerk says, "and so you say all;" or (2) when there is some doubt as to the reply of the jurymen; or (3) when polling is made requisite by statute: See *U. S. v. Bridges*, U. S. Cir. Ct. Ala. 1879, where it was held by Judge Bruce that there could be no polling on a sealed verdict; and see criticisms in 1 *Crim. Law Mag.* 7; 1 *Southern Law J. (N. S.)* 9; and 10 *Cent. L. J.* 1.

So far as concerns the last point there can be no question as to the propriety of Judge Drummond's ruling. A sealed verdict cannot be properly rendered by being left with the clerk and opened by him in the absence of the jury. The verdict must be brought by the jury into court and opened in their presence. *U. S. v. Potter*, 6 McLean, 182; *Wright v. State*, 11 Ind. 569; *Martin v. Morelock*, 32 Ill. 485; *Fisher v. People*, 23 Ill. 285; *Stewart v. People*, 23 Mich. 63.

FRANCIS WHARTON.

In re WARDER.

(District Court, D. New Jersey. February 6, 1882.)

1. MEMBERSHIP IN CORPORATION AS ASSETS.

Membership in a corporation, organized for business purposes, is property which passes to the assignee in bankruptcy, under sections 5044 and 5046 of the Revised Statutes, and which creditors of a bankrupt are entitled to have applied to the payment of their debts.

In Bankruptcy. Rule on bankrupt to transfer property.

Hamilton Wallis, for the assignee.

A. Marks, for the bankrupt.

NIXON, D. J. This is an application to the court for a rule upon the bankrupt, directing and requiring him to transfer his membership in the New York Produce Exchange to his assignee in bankruptcy, and to execute all writings necessary for that purpose. The motion is resisted by the bankrupt, on the ground that the certificate of membership is not an asset belonging to the creditors under the provisions of the bankrupt law.

The single question is whether membership in a corporation organized for the purposes expressed in the charter of the produce exchange is property which passes to the assignee in bankruptcy, under sections 5044 and 5046 of the Revised Statutes.

The charter and by-laws of the association were produced on the argument, and from these I learn that the original act of incorporation was passed by the legislature of the state of New York on the nineteenth of April, 1862; that the name of the corporation was "The New York Commercial Association;" that its purposes were to provide and regulate a suitable room or rooms for a produce exchange in the city of New York; to inculcate just and equitable principles in trade; to establish and maintain uniformity in commercial usages; to acquire, preserve, and disseminate valuable business information; and to adjust controversies and misunderstanding between persons engaged in business. The act further authorized the corporation to take and hold by grant, purchase, and devise real and personal property, to an amount not exceeding \$300,000, for the purposes of the association. On the thirteenth of February, 1868, an amendment to the charter was obtained, changing the name from "The New York Commercial Association" to "New York Produce Exchange;" and on the nineteenth of May, 1873, another amendment was passed, au-

thorizing the corporation to take and hold real and personal property to an amount not exceeding \$1,500,000.

The third section of the by-laws provides that "any respectable person, on the proposal of one member, seconded by another, and on presentation of a written application stating the nature of his business, and such other facts as the board of managers may require, after 10 days' notice of such application has been conspicuously posted upon the exchange, shall be admitted to membership, if elected by the board of managers, on presentation of a certificate of membership duly assigned to him, and on the signing of an agreement to abide by the charter, by-laws, and rules of the exchange, and all amendments that may be made thereto."

The fourth section enacts that "each member shall be entitled to receive a certificate of membership, bearing the corporate seal of the exchange, and the signatures of the president and secretary, which shall be transferable upon the books thereof, to any person eligible to membership, upon the payment of a transfer fee of five dollars and any unpaid assessments due thereon. The certificate of membership of a deceased member may be transferred by his legal representatives."

This, then, is a business corporation, the members of which have certain privileges, and upon its dissolution would receive their proportionate share of its assets. Any respectable person is eligible to membership, although no one can be elected without the vote of the managers. When elected such person becomes entitled to his seat on the presentation of a certificate of membership duly assigned to him, and on signing an agreement to abide by the charter, by-laws, and rules of the exchange. Such a provision clearly contemplates the assignment of the certificate to persons who are not at the time members. The bankrupt, therefore, before his bankruptcy, had the power of selling and assigning his certificate of membership to any one who was willing to purchase the same, and take the risk of an election by the board of managers. It had and has a market value, the statement being made on the argument, without contradiction, that it would readily bring several thousand dollars. Under the circumstances I have no difficulty, on principle, in holding that membership in such an exchange is property which the creditors of a bankrupt are entitled to have applied to the payment of their debts.

In *Hyde v. Woods*, 94 U. S. 523, the supreme court so treated it,

although that was not the precise question in the case. "There can be no doubt," says Mr. Justice Miller, speaking for the whole court, "that the incorporeal right which Fenn, the bankrupt, had to this seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that if he had made no such assignment it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy."

I am aware that *In re Sutherland*, 6 Biss. 526, Judge Blodgett seems to have come to a different conclusion. I have read the case with care, hoping to find some provisions in the charter of the Chicago Board of Trade to distinguish it from the case under consideration. This I have been unable to do; but *Hyde v. Woods*, *supra*, is subsequent in date, and in questions of this sort it is my duty to follow the supreme court. The district court of the United States for the southern district of New York, in February, 1880, made an order requiring a bankrupt to vest the title to his seat in the New York Stock Exchange in the assignee in bankruptcy. I think the present application falls within the principle of that case, and I approve of the reasoning of Judge Choate in his opinion granting the order. *In re Ketchum*, 1 FED. REP. 840.

Let an order be entered directing the bankrupt to transfer his membership in the New York Produce Exchange to the assignee.

In re JESSE BOYNTON.

In re LYMAN BOYNTON.

In re BOYNTON BROTHERS.

(District Court, D. Rhode Island. February 7, 1882.)

1. BANKRUPTCY—RESIDENT ALIENS.

Resident aliens may take the benefit of the bankrupt act.

2. SAME—INSUFFICIENT GROUNDS FOR WITHHOLDING DISCHARGE.

Omissions from the schedule or inventory which were unintentional, the result of an oversight or mistake, and not wilful, should not bar a discharge.

3. SAME—PAYMENTS THROUGH INADVERTENCE.

Payments made to employes several days before filing the petition, through inadvertence or a mistaken sense of duty, should not deprive bankrupts of their discharge. So payment of attorneys' fees is not such a preference as will prevent a discharge.

4. SAME—CONVEYANCES IN ABSENCE OF CONCEALMENT.

Conveyances of stocks made by bankrupt to his wife, long before bankruptcy, and in the absence of concealment, are no ground for withholding a discharge.

5. SAME—VIOLATION OF PROVISIONS OF BANKRUPT ACT—EVIDENCE.

Where the estate of the bankrupts yields a large percentage of the indebtedness, and where the only evidence adduced by the opposing creditors is the examination of the bankrupts before the register, the court should be clearly satisfied, upon the proof submitted, of the violation of the bankrupt act before withholding a discharge.

In Bankruptcy.

N. B. Bryant, for creditors.

James M. Ripley, for bankrupts.

COLT, D. J. In this case specifications are filed by sundry objecting creditors against the discharge of the bankrupts. It appears that the individual estate of Jesse Boynton paid 91 per cent.; that no debts were proved against the individual estate of Lyman Boynton; and that the firm of Boynton Bros., composed of Jesse and Lyman, paid 81 per cent. While the specifications in terms oppose the discharge of both brothers, yet we learn from the statement of counsel that the objecting creditors desire mainly to resist the discharge of Jesse Boynton.

The first specification, that the bankrupts are not citizens of the United States, and so not entitled to the benefit of the bankrupt act, is not pressed, in view, probably, of the fact that they have resided in this country for more than 25 years, and that resident aliens may take the benefit of the act.

The second specification charges wilful false swearing in the affidavit annexed to the schedule or inventory, in that a certain farm in Canada, and certain real estate in Boston, were knowingly omitted therefrom. The evidence of Jesse Boynton discloses that he and his brother had conveyed to them many years before a farm in Canada of some 75 acres, which he thinks might sell for \$1,000. He states that he had not thought of this property for years; and when questioned further as to whether the farm had not been within a few years on his books, in the form of assets, at a valuation of \$2,600, he answers that he does not know; that he never ordered it put there, and if there, representing such an amount, it was the sum paid for it. In the absence of any testimony impeaching this statement, and believing that the court should not hastily presume fraud merely from the fact of such an omission, in a case where the payment of so large a percentage of indebtedness tends to show general good faith, we cannot but conclude that this omission was unintentional—an over-

sight or mistake—not a wilful act; therefore it should not bar a discharge. *In re Wyatt*, 2 N. B. R. 288; *In re Smith*, 13 N. B. R. 256; *In re McVey*, 2 N. B. R. 257.

The evidence does not support any omission from the inventory of real estate in Boston. The latter part of this specification charges the omission of certain lands, stocks, and money of great value, but this general allegation is not established by proof.

The third specification alleges fraudulent preferences in paying sundry creditors a few days before bankruptcy, when insolvent and in contemplation of bankruptcy, and among others J. C. Boynton, a son of one of the bankrupts. From the examination of the bankrupts before the register we find that \$604 was paid as wages to workmen several days before the filing of the petition, the sum of \$60 in three different amounts at different times to J. C. Boynton for services, the sum of \$300 to their counsel, Thurston, Ripley & Co., and \$90 to the clerk of the court. Some of these payments certainly were proper and regular, and so far as any of them may have been improper, there is nothing to show that they were made with any fraudulent intent, but rather through inadvertence or a mistaken sense of duty; consequently the bankrupts should not be deprived of their discharge. *In re Rosenfeld*, 2 N. B. R. 117; *In re Sidle*, 2 N. B. R. 220; *In re Locke*, 1 Low. 293; *In re Burgess*, 3 N. B. R. 196.

Payment of attorneys' fees is not such a preference as will prevent a discharge. *In re Sidle*, 2 N. B. R. 221; *In re Rosenfeld*, 2 N. B. R. 116.

The fourth specification, that each of the bankrupts wilfully swore falsely in omitting large sums of money from their schedules, is another general allegation unsupported by proof.

The fifth and last specification contains another charge of similar character against Jesse Boynton in omitting from his inventory \$5,000 withdrawn from the firm; also other property, comprising sundry shares of different stocks specifically mentioned; also horses and carriages.

Boynton admits that he drew from the firm from \$10,000 to \$12,000 during the year 1878, and prior to September 1st, for current family expenses. This may seem a large sum, but the testimony is that he did not expect to go into bankruptcy until within 10 days of the filing of the petition, August 31, 1878, and no proof is offered to show that the money was not actually spent as stated, or to establish fraud or concealment in any form. *In re Rosenfeld*, 2 N. B. R. 116. It also appears that certain shares of stock were transferred to his

wife five or six years before bankruptcy, and that he has borrowed money, giving the stock as collateral security. He swears that the transfers were made *bona fide*, and no proof is brought forward to contradict him. Such conveyances, made long before bankruptcy, and in the absence of concealment, are no ground for withholding a discharge. *In re Murdock*, 3 N. B. R. 146; 1 Low. 362.

There seems to have been nothing irregular in the sale of the other stocks mentioned, or in the disposition of the proceeds. The ownership of any horses is denied, but the bankrupt admits having an old carriage or two in the stable. This latter omission is hardly of such a serious character as to affect the discharge. Had these bankrupts intended to have defrauded their creditors it is more than probable that their estate would have yielded a smaller percentage of their indebtedness, and when in addition to this we find that the only evidence brought forward by the opposing creditors is the examination of the bankrupts before the register, and that no witness is produced to show any facts tending to contradict them. The court should be clearly satisfied, upon the proof submitted, of the violation of the provisions of the bankrupt act set out in the specifications before withholding a discharge. *In re Burgess*, 3 N. B. R. 196.

We are not so satisfied, and therefore a discharge is granted in each case.

PLATT, Assignee, etc., v. MATTHEWS and others.

(District Court, S. D. New York. January 30, 1882.)

1. BANKRUPTCY—TITLE OF ASSIGNEE—SUIT TO RECOVER INTEREST OF BANKRUPT ON PROPERTY TRANSFERRED IN FRAUD.

The bankrupt act vests the assignee with the title to all property conveyed by the bankrupt in fraud of creditors; and he may proceed to recover the interest of the bankrupt in such property, whether any creditor was in a position to attack the transfer or not.

In Bankruptcy.

Austin G. Fox, for plaintiff.

Abbott Brothers, for defendants.

WALLACE, D. J. Separate demurrers are interposed by the defendants Matthews and wife, and the defendant Murchison, to the bill of complaint. The complainant is the assignee in bankruptcy of Matthews, and the bill is framed with the object of reaching the interest

of the bankrupt in certain mortgage bonds of the Carolina Central Railroad Company, which were transferred by the bankrupt to his wife, as is alleged, in fraud of creditors, and which were thereafter pledged to several of the parties defendant, including Murchison, as collateral to loans to Mrs. Matthews. As the bill does not allege that the transfers from Matthews to his wife were in contravention of the bankrupt act, but proceeds upon the theory that they were fraudulent as to creditors, and omits to aver that any creditors of Matthews ever obtained a judgment, or were in a position to assert a lien upon the property transferred or a right to have the property applied to satisfy any lien they might perfect, the point is taken that the assignee cannot maintain the action. If the assignee has no other right to follow the property than was possessed by Matthews' creditors at the time of the bankruptcy proceeding, this position is undoubtedly correct, because it is clear that creditors at large cannot assail a fraudulent transfer of property by their debtor; they must put themselves in a position to perfect a lien therein by a judgment and execution, so as to subject the property to the satisfaction of the lien when the obstacle of the fraudulent transfer is removed. But the difficulty with this position is that the bankrupt act vests the assignee with the title of all property conveyed by the bankrupt in fraud of creditors, and the assignee acquires his rights by the act itself, and not through what has been done by the creditors. By a statute of this state, also, an assignee or other trustee of the property of an individual may, for the benefit of creditors, disaffirm and treat as void all transfers in fraud of the rights of any creditor, (Laws 1858, c. 314,) and it has been decided that under this statute an assignee in bankruptcy may maintain an action at law to recover the proceeds of property so transferred. *Southard v. Benson*, 72 N. Y. 434. In that case the precise question involved here was discussed, and it was determined that under the bankrupt act property so transferred is vested in the assignee by the express terms of the act, and that he represents the creditors' rights without the technical obstructions to the enforcement of these rights by a creditor at large. The same conclusion was reached in the circuit court of this district by Judge Woodruff, in *Re Leland*, 10 Blatchf. 503. *Re Collins*, 12 Blatchf. 548, contains expressions indicating a different view. But in both these cases the transfer attacked was not alleged to be fraudulent, but was a chattel mortgage, which was void by statute as against creditors, because not filed as the law required. As was held in *Stewart v. Platt*, 101 U. S. 731, such a failure to file a chattel

mortgage could not be taken advantage of by the assignee, because it did not render the mortgage void as to creditors at large, but only to such creditors as had judgments; as between mortgagor and mortgagee it was a valid lien upon the property, and the assignee took the property subject to the lien. Where there is fraud the assignee can contest the lien on the title of the vendee, although the bankrupt could not. Where there is no fraud he cannot assail the transaction unless it contravenes the bankrupt act, but acquires simply the rights of the bankrupt. Numerous other authorities might be cited to sustain the position that an assignee may proceed to recover property transferred in fraud of creditors whether any creditor was in a position to attack the transfer or not, and that his title accrues by force of the act, and not through the rights of the creditor to assert the fraud. See authorities collected in *Re Duncan*, 14 N. B. R. 33.

The other objections to the bill presented by the demurrer are not meritorious. The action is not for an accounting, nor does it assail the title of Murchison as a pledgee of the bonds. The bill seeks to reach only the interest in the bonds which would belong to Mrs. Matthews if the transfer to her had not been fraudulent, and in this behalf asks a recovery of Murchison as to the amount due him as pledgee, and an account of the proceeds in case of a sale. A tender of the amount due to the pledgees was not prerequisite to the relief asked. The bonds pledged to Murchison are identified by the numbers, in connection with the general allegations of the bill, as part of those originally owned by Matthews.

The demurrer is overruled.

ATWOOD v. THE PORTLAND COMPANY.

(Circuit Court, D. Maine. July 5, 1880.)

1. PATENT—SUIT FOR AN ACCOUNTING.

A suit in equity for an accounting may be maintained without demanding an injunction.

2. SAME—JURISDICTION—INJUNCTION.

Circuit courts have "original cognizance, as well in equity as at law, of all actions, suits, and controversies" arising under the patent laws; and their power to grant an injunction is a mere incident.

3. REISSUE—VOID ACTS OF COMMISSIONER.

In case of a reissue of a patent the patentee may claim something which he had before described as one mode of making his machine or article, when he is informed of its importance. A reissue which was first in time cannot be affected by subsequent void acts of the commissioner.

In Equity. Reissue of patent.

LOWELL, C. J. Anson Atwood brings this bill upon the reissued patent granted him in 1857, No. 468, for a cast-iron car wheel. The original patent was granted in 1847; there was an extension of the reissued patent in 1861; and this suit was brought nearly six years after the end of the extended term; but the statute of limitations is not relied on at this stage of the case.

The defendants contend that a suit in equity cannot be maintained, because no injunction can now be issued, and they consider the account to be a mere incident to the injunction. In my opinion the account is no more incident to the injunction than the reverse. In *Eureka Co. v. Bailey Co.* 11 Wall. 488, which was an appeal from my decision, a bill was sustained for an account of royalties due by a contract concerning a patent; but the suit was not a patent suit, and an injunction against the use of the plaintiff's invention was asked and issued as incident to the accounting,—that is to say, until the defendants should pay the royalties. A similar case is *Magic Ruffle Co. v. Elm City Co.* 11 O. G. 501, 13 Blatchf. 151, where the bill was sustained for an account under a contract relating to a patent, but without injunction, the patent having expired.

Bills have been upheld and decrees rendered for an account, when the patent had expired during the progress of the cause, in *Jordan v. Dobson*, 2 Abb. (U. S.) 398; *Sickles v. Gloucester Manuf'g Co.* 1 Fish. 222, 3 Wall. Jr. 196, 4 Blatchf. 229, note; *Imlay v. Nor. & Wor. R. Co.* 4 Blatchf. 227; *Neilson v. Betts*, L. R. 5 H. of L. 1; *Seymour v. Marsh*, 6 Fish. 115, affirmed, 97 U. S. 348. In this last case the point was

not taken, but the fact was an obvious one, and the point was undoubtedly considered untenable.

So where the patent had expired before suit was brought, or the defendant had died before or during suit, and there were no circumstances which authorized an injunction against his executor. *Howes v. Nute*, 4 Fish. 263; *American Wood Paper Co. v. Glen's Falls Paper Co.* 8 Blatchf. 513; *McComb v. Beard*, 10 Blatchf. 350; *Smith v. Baker*, 5 O. G. 496; *Atterbury v. Gill*, 13 O. G. 276.

In *Draper v. Hudson*, 1 Holmes, 208, Judge Shepley refused an account because an injunction could not be granted, but he cited none of the foregoing cases, and evidently overlooked the decision of Mr. Justice Clifford and myself in *Howes v. Nute*, 4 Fish. 263. As an authority in this court, therefore, his decision is not binding. It was made upon the supposed authority of *Stevens v. Gladding*, 17 How. 447, which, when carefully examined, is found not to decide this point. An injunction having been ordered in that case, an account was given as incident thereto; but it was not, and, under the facts, could not be, decided that an account could never be ordered excepting as incident to an injunction.

The question has lately been revived, and two judges have refused to sustain a bill after the expiration of the patent. *Vaughan v. Cent. P. R. Co.* 4 Sawy. 280; *Sayles v. Richmond, etc., R. Co.* 11 Chi. Leg. N. 281. Two other judges, one of whom has had very great experience in patent causes, have upheld the equitable jurisdiction. *Vaughan v. East Tenn., etc., R. Co.* 9 Chi. Leg. N. 255; 11 O. G. 789; *Gordon v. Anthony*, before *Blatchford, J.*, April, 1879, an extract from whose judgment has been handed me. 16 Blatchf. 234.

In the absence of a decision by the supreme court, I follow what I consider the preponderance of authority in the circuit courts.

The statute of February 15, 1819, (3 St. 481,) gave to the circuit courts of the United States "original cognizance, as well in equity as at law, of all actions, suits, and controversies" arising under the patent laws. To this broad grant is added an express power to grant injunctions according to the course of courts of equity. This law was re-enacted in the two general acts revising and remodelling the patent law. Statute July 4, 1836, § 17, (5 St. 124;) and July 8, 1870, § 55, (16 St. 206.) This case arises under the law of 1870, and I have therefore no occasion to consider the effect of the provisions of the Revised Statutes upon this subject, though I should be surprised to find that they had changed the law.

I do not see how it is possible to contend that this comprehensive

grant of power can be construed to depend upon the added power to grant injunctions. In the following cases, very able and learned judges have said that the jurisdiction is statutory, and not dependent upon the general rules which govern what we may call customary equity, or have simply said that the plaintiff might elect his remedy. *Nevins v. Johnson*, 3 Blatchf. 80; *Sickles v. Gloucester Manuf'g Co.* 3 Wall. Jr. 196; *Imlay v. Nor. & Wor. R. Co.* 4 Blatchf. 227; *Howes v. Nute*, 4 Fish. 263; *Hoffheins v. Brandt*, 3 Fish. 218; *Marsh v. Seymour*, 97 U. S. 348, 349; *Perry v. Corning*, 7 Blatchf. 195; *Cowing v. Rumsey*, 8 Blatchf. 36, 38. Add to these the several decisions before cited, and the point seems to be established; for those decisions can hardly rest upon a narrower foundation.

Mr. Justice Grier, one of the first judges to lay down this broad rule, afterwards qualified its generality in certain *dicta*; but he was careful not to decide against the jurisdiction in equity. See *Livingston v. Jones*, 3 Wall. Jr. 330, 344; *Sanders v. Logan*, 2 Fish. 170; and see Judge McKennan's explanation of these cases in *McMillin v. Barclay*, 5 Fish. 189, 194.

A constitutional objection might, perhaps, be raised to the denial of a jury trial in the case of a bill for the mere recovery of a definite sum of money, if the plaintiff clearly required no equitable remedy or assistance whatsoever. That point has not been argued in this or any other case that I know of, and may be left for decision when it shall arise. Such cases must be rare, because the accounting in equity is a peculiar remedy, to which an action at law for damages can very rarely be adequate, unless the plaintiff chooses to consider it so. He may call for an account in equity, and, if that proves unsatisfactory, may add damages in the same suit. This case might rest upon that basis.

In relation to the validity of the reissue the facts are as follows: In his original patent, Atwood described a car wheel cast in one piece, with a solid hub; next the rim was a plate (called by him a ring) made in a succession of radial waves, or corrugations like radii, and this plate was connected with the hub by means of a dished "flanch or flanches," which would yield to the contraction of the metal in the direction of the radii. The patentee supposed that the contraction of the wheel in cooling was principally in a circumferential direction, or across the radii, and the radial waves would yield in this direction. His claim was limited to that form of plate and a flanch or flanches. It was discovered afterwards that the contraction is

principally in the line of the radii. What the patentee called dished flanches, when put together, made an arch; and a wheel cast with an arch next the hub yields readily in the direction of the radii, and a wheel with such an arch for about half the width of the wheel, and a single plate from the arch to the rim, proved to be a better article than any before discovered, and it has not been much improved upon since. Washburn appears to have discovered the merit of a wheel of this kind, and in 1850 he patented one, which he described thus: From each end of the hub two arch-shaped plates project radially outward all around, and join at a point half the semi-diameter of the wheel from the center, or a little beyond it. * * * From the front junction of the two plates there is an extension of a single plate, curved in its radial section, and forming an ogee with the front plate; on the concave face of this extension curved arms or brackets are affixed, perpendicular to the face of the plate, and gradually tapering from the rim to the junction above named of the plates, etc. The claim is for the combination of the arch at the center with the curved plate and arms, connecting the hub and the rim in the manner and for the purpose set forth.

This Washburn wheel went into the general use which it continues to hold in a few years after 1850; certainly as early as 1857. Atwood considered the Washburn wheel to be substantially like his, and reissued his patent in order to obtain what he thought to be the full monopoly of his discovery. His claim is for connecting the wheel with the hub by two curved plates extending from the hub and forming a ring or arch, and joining this ring with the rim by a single plate. Upon the evidence of the drawings in Atwood's original patent, I find that his "dished flanches" made an arch between the hub and the plate to all intents like Washburn's arch, and his single plate in radial waves is the equivalent of a single plate like Washburn's. One of the drawings in Atwood's original patent shows the flanches united and forming an arch. The question, then, is whether Atwood has changed his description, either by inclusion or exclusion, so as to embrace something which he had not invented, or had not described, or indicated in his drawings? The cases of *Gill v. Wells*, 22 Wall. 1, and *Russell v. Dodge*, 93 U. S. 460, decide that a patentee reissuing his patent has no right to omit something which he had before described as essential. I do not think the converse is true, that he may not claim something which he had described as one mode of making his machine or article. For the thing which he

actually made and exhibited he is to have a patent, though he may have said that an alternative form was equally good. See *Battin v. Taggart*, 17 How. 74; *Goodyear v. Rubber Co.* 2 Cliff. 351, 9 Wall. 788; *Robertson v. Secombe Manuf'g Co.* 10 Blatchf. 481; *Putnam v. Yerrington*, 9 O. G. 689; *Stevens v. Pritchard*, 10 O. G. 505; *Cornplanter Patent*, 23 Wall. 181; *Herring v. Nelson*, 14 Blatchf. 293. Atwood had shown the arch and described its uses, and may afterwards claim it when he is informed of its importance.

It appears that the office issued three new patents upon the surrender of the plaintiff's original patent. Two of them were of a later date than that now in issue, and are not in evidence. The defendant objects that this was *ultra vires*; that the commissioner could only reissue one or more patents immediately upon the surrender. To this the plaintiff's answer is satisfactory, that this reissue, which was the first, cannot be affected by subsequent void acts of the commissioner, supposing them to have been void, which he does not admit, but must stand or fall on its own merits. It is a little like the old case of insurance. A policy was to be void if the assured obtained further insurance without permission; he did this, but the policy he obtained was to be void if there were prior insurance. The latter policy being avoided by the earlier one, that earlier one stood valid. Reported cases inform us that the patent-office often reissues patents in the mode now objected to; and I do not now decide that it has exceeded its authority in doing so.

A very difficult question of fact is raised by the record. Positive testimony is given that a wheel like Atwood's was made by Mr. Baldwin, a well-known worker in iron, at Philadelphia, about 30 years before the testimony was given. The foreman and a pattern maker of Baldwin's shop are asked whether they made a wheel which is described in the question in the words of the plaintiff's claim, and they say they did. This evidence is not and cannot be directly met, but the plaintiff's evidence tends to throw a good deal of doubt upon it indirectly. The turning point in my mind is this: Several suits were brought by Atwood against makers of the Washburn wheel in 1858. Mr. Waterman, a witness in this case, was employed for the defence in one or more of those cases, and then discovered the old Baldwin patterns and cast wheels from them. He says that he considered them a complete answer to the patent, but that Atwood withdrew his actions, as the witness was informed, and so the matter passed out of his mind for many years until this case

revived it. It appears that the defence had very able and diligent counsel, and no doubt the plaintiff was well advised. If the suits were voluntarily withdrawn by the plaintiff 20 years ago, it must probably be that the Baldwin wheel was thought by both sides to be fatal to the Atwood patent. But it seems, from the undisputed testimony of the patentee himself, that all the defendants, in every action which he brought, took licenses from him, and that the same persons, or most of them, vainly opposed the extension of his patent. Waterman, then, was mistaken, if he used the word "withdrawn" in the sense of abandoned. It was the defendants who withdrew. This makes it almost *res judicata*, so far as those parties are concerned, that the Baldwin wheel was not an anticipation of Atwood's, and, in the uncertainty of the evidence which arises from the great lapse of time, has had a controlling influence on my decision. I cannot hold that the parties at the time, and the patent-office afterwards, with all the facts before them, were mistaken. It is more probable that there is some mistake in the evidence now.

The Kinsley wheel appears to have had two arches instead of an arch and a plate—that is, there was a hollow under the tread of the wheels as well as near the hub; and, upon the evidence, there are objections to this form.

Atwood having been the first to make the combination of hub, arch, and plate, has a right to ask for a somewhat liberal construction of his claim, and may include in it the wheel made by the defendants.

Decree for an account.

NEW PROCESS FERMENTATION CO. v. BALTZ.*

(Circuit Court, E. D. Pennsylvania. January 18, 1882.)

1. PROCESS FOR MAKING BEER—INFRINGEMENT

Letters patent No. 215,679, for a new and useful apparatus and improvement in processes for making beer, *held* not to be infringed by the use of the Guth patented bung after the casks are bunged, simply for the purpose of racking off the beer from the shavings casks and relieving them from the excessive pressure of carbonic acid gas.

Final Hearing on Pleadings and Proof.

Bill for injunction against infringement of letters patent No. 215,679, dated May 20, 1874, for a new and useful apparatus and improvement in processes for making beer. The answer denied both the novelty and the infringement. The evidence showed that in the manufacture of the beer after the casks containing the beer were bunged respondent used the bung patented by Henry Guth, in letters patent No. 225,368, for the purpose of racking off the beer from the shavings casks and relieving them from excessive pressure. The principal question raised was whether, in using this bung, respondent infringed complainant's patent.

Banning & Banning, F. W. Cotzhausen, and P. C. Dyrenforth, for complainants.

John Dolman, for respondent.

McKENNAN, C. J. Although the answer denies the validity of the patent on which this suit is founded, the respondent's counsel has confined his discussion of the case to the question of infringement, and that is the only question which we deem it necessary to consider.

The only proof in support of the allegation of infringement produced by the complainant is the testimony of Mathias Hoffman, but, unaided by the presumption arising from the absence of any proof on the other side, it could not be regarded as sufficient to acquit the complainant of the burden which rests upon it. It is answered fully, however, by the testimony of John Birkenstock. From 1873 to 1879 he was assistant foreman at the respondent's brewery, and after the latter date was the brewer. He had responsible charge of the manufacture of beer, and the whole process was conducted under his supervision and direction. He distinctly negatives the use of any part of the process described and covered by the complainant's patent.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

The patented process provides for the treatment of beer when it is in the Krauesen stage by holding it under automatically controllable pressure of carbonic acid gas by appropriate mechanical devices. When this stage ends the process is fully accomplished, and, in the understanding of the trade, the Krauesen stage terminates when the casks containing the liquid are bunged.

Now, although it is admitted that the respondents use the Guth patented bung, by means of which the complainant's process may be practiced, yet it is satisfactorily shown by all the evidence that it is not used as long as the beer works out of the bung-hole of the shavings casks, but only when the casks are bunged, and so when the patented process is, by its express limitation, inapplicable. And this bung is not even then used to produce any result contemplated by the complainant's process, but only in racking off the beer from the shavings casks, and as a means of relieving them from an excessive pressure of carbonic acid gas.

We are, therefore, of opinion that the respondent is not shown to have used the complainant's process, and so to have infringed its patent, and that the bill must be dismissed, with costs.

SPILL v. CELLULOID MANUF'G Co.*

(Circuit Court, S. D. New York. January 25, 1882.)

1. LETTERS PATENT No. 97,454—CONSTRUCTION OF.

Letters patent No. 97,454 contains no suggestion that camphor itself, or a solution of camphor in any thing which would dissolve it, is a solvent of xyloidine. Said patent is neither infringed by the use of wood alcohol in conjunction with camphor, if said wood alcohol is the same thing as wood naphtha, as such use is described in Parke's patent, No. 1,313, nor if it be a new article, discovered since the date of the invention described in said patent 97,454. The claim of said patent is expressly limited to that alcohol which is spirits of wine, and does not cover methyl alcohol.

In Equity. Motion for injunction.

H. M. Ruggles, for plaintiff.

W. D. Shipman and *H. Baldwin, Jr.*, for defendant.

BLATCHFORD, C. J. There is no suggestion in the specification of No. 97,454 that the plaintiff discovered that camphor itself, or a

*Reported by S. Nelson White, Esq., of the New York bar.

solution of camphor in any thing which would dissolve it, would be a solvent of xyloidine. Of the eight mixtures mentioned as solvents of xyloidine, camphor is in only five. The discovery is that the mixtures named are the solvents. If the wood alcohol used by the defendant is of itself a solvent of xyloidine, and is the same thing known as a solvent of it, under the name of wood naphtha, at the date of Parke's patent No. 1,313, the defendant may use it in conjunction with camphor, because such use is made known in No. 1,313. If such wood alcohol is a new article, discovered since the plaintiff's invention, it may be used by the defendant, because the patent covers only the use of alcohol or spirits of wine with camphor; and such new article is not alcohol or spirits of wine, and is not within the claim. The claim does not cover anything which may be discovered subsequently to effect, in conjunction with camphor, as good a result in dissolving xyloidine as the use of alcohol or spirits of wine in conjunction with camphor. And even though the defendant's wood alcohol be methyl alcohol, and an article known by that name before the plaintiff's invention, it cannot be held that the plaintiff discovered the usefulness of it in conjunction with camphor to dissolve xyloidine, because his patent is expressly limited to that alcohol which is spirits of wine, and that is not methyl alcohol.

The motion is denied, with costs.

WHITE and others v. HEATH.

(Circuit Court, D. Rhode Island.)

1. PATENT—INFRINGEMENT.

Changes in the details of construction of a patented article may be patentable as improvements, but they will not protect the party against the charge of an infringement of the original patent.

2. SAME—INJUNCTION.

Where the validity of the original patent is not questioned by the defendant, capital has been invested in its manufacture, a successful business established, large and numerous sales have taken place without dispute, and exclusive possession is shown for some time, a preliminary injunction will be granted.

In Equity. Petition for preliminary injunction.

Wilmarth H. Thurston, for complainants.

Warren R. Pirce, for defendant.

COLT, D. J. This is an application for a preliminary injunction. The complainants, having acquired title by assignment to a certain patent issued to Charles S. Westland for an improvement in lamps, charge the defendant with an infringement. This patent, No. 206,061, was issued July 16, 1878, and the claim is as follows:

"The combination, with a lamp for burning explosive or inflammable oils or fluids, of a closed receptacle containing carbonic acid gas under pressure, so located with relation to the burner that in case of an explosion the compressed gas will be liberated, substantially as and for the purposes set forth."

The object of this invention was to avoid the danger from fire, in the event of an explosion of a lamp in which kerosene or other inflammable fluid might be used, by means of a closed receptacle, or chamber of glass or other fragile material, charged with carbonic acid gas fitting about or into the oil reservoir. Immediately upon the issuing of the patent, Westland sought capital to establish the business of manufacturing the lamp. Among those whom he met was the defendant, Heath, and on September 16, 1878, he sold to him one-third interest in the patent. On July 3, 1879, the complainants White and Fairbrother bought the remaining two-thirds, and on January 28, 1881, they also purchased the other one-third of Heath and another person to whom he had transferred a part. We thus find that the defendant was interested in this patent up to January 28, 1881. On March 1, 1881, the defendant took out letters patent, No. 238,234, for an improvement in safety lamps, and he claims that the lamps complained of are made under this patent. The position taken by the plaintiffs is—*First*, that the lamps in question are not made under the defendant's patent, because the main features of that patent, which consisted of certain details in the construction of safety lamps, are omitted; *second*, that even if made under that patent they would be an infringement of the Westland patent.

The inquiry whether the lamps made by the defendant conform to his patent we deem, under the circumstances, immaterial. The only defence offered by Heath is his patent, and if that does not protect him he is guilty, under the evidence, of the charge of infringement. An examination of the defendant's patent shows that it embraces the main elements of the Westland patent. It consists of a combination, with a lamp for burning explosive oils, of a closed receptacle containing carbonic acid gas, so located that in case of an explosion the compressed gas will be liberated. What is claimed in the specification is an improvement "in certain details of construction whereby the pas-

sage of the gas to the inside of the reservoir and to the flame is insured."

These details relate mainly to the construction of the gas receptacle, it having "grooves or flutes" running down into the oil reservoir; the defendant claiming that by his invention the gas chamber is less liable to get broken, at the same time the gas comes into more immediate contact with the flame in case of an explosion. But admitting that the defendant has worked out an improvement in details in the gas receptacle, still he had no right to use all the main elements of the Westland patent. Westland's patent was the application of the power of carbonic acid gas, in extinguishing flames, to an ordinary lamp containing any inflammable oil, like kerosene, by means of a closed receptacle holding such gas. Changes in the details of construction of such receptacle might be patentable as improvements, but would not protect the party against the charge of an infringement of the former patent.

But the general idea of a receptacle with tubes extending into the oil is not absent from the Westland patent, for the specification sets out that gas tubes may extend up into the oil from the bottom, and that small closed vials of compressed gas may be dropped into the oil at the top. The defendant does not undertake to prove that his patent is not an infringement, by any evidence further than his statement in his affidavit that on consultation and advice with eminent experts and counsel in patent matters, he *believes* that his improved safety lamp is not an infringement upon any rights properly claimed by the Westland patent. We are of the opinion that he is guilty of an infringement for the reasons given.

The validity of the Westland patent is not questioned by the defendant. Capital to the extent of \$20,000 has been invested in the manufacture of these lamps and a successful business established. Large and numerous sales have taken place without dispute. Exclusive possession is shown for some time, though not for a long period. Under these circumstances an injunction is seldom refused. *Curtis*, Law of Patents, § 413; *Orr v. Littlefield*, 1 W. & M. 13; *Potter v. Muller*, 2 Fish. 465.

The statement of the defendant in his affidavit that the only lamps he has made were for experimental use, should not, in view of other undisputed testimony, affect the granting of an injunction. It appears that these lamps were exhibited at the fair of the Massachusetts Charitable Mechanics' Association, held in the fall of 1881, and that circulars were distributed to the public setting off their advan-

tages. It further appears that the lamp has been otherwise advertised. If sales have not actually been made, such a wrong is threatened, and that is sufficient to call for an injunction. Bump, Law of Patents, 294; *Poppenhusen v. Gutta Percha Co.* 2 Fish. 74. Nor is the assertion of the defendant in his affidavit, that he has no intention of making or selling any of said lamps during the pendency of this suit, a good reason for withholding an injunction. The complainants are not obliged to rest their interest on the mere assertion of the defendant that he will not repeat the act of infringement. Bump, Law of Patents, 295; *Jenkins v. Greenwald*, 2 Fish. 37.

The motion for a preliminary injunction is granted.

THE ANT.

(District Court, D. New Jersey. February 3, 1882.)

1. COLLISION.

A steamer with a long tow, about to pass another steamer, also with a tow, is bound to avoid the latter.

2. SAME—LOOKOUT.

Steamers navigating on the thoroughfares of commerce are bound to have a lookout, independently of the helmsman.

3. SAME—LIGHTS.

Steam-vessels, "when towing other vessels," must exhibit two bright white mast-head lights vertically, in addition to their side lights; and all vessels, whether steam or sail vessels, when lying at anchor in roadsteads or fair-ways, must exhibit a white light in a globular lantern at a height not exceeding 20 feet above the hull. In navigation a vessel aground is in circumstances similar to a vessel at anchor, and a steamer aground should exhibit the single light required of steamers at anchor.

4. DAMAGES DIVIDED.

Where both steamers contributed to the collision the damages will be divided.

In Admiralty. Libel *in rem*.

Beebe, Wilcox & Hobbs, for libellants.

S. H. Valentine, (with whom was *R. D. Benedict*), for claimants.

NIXON, D. J. The libel is filed in this case to recover damages arising from a collision which took place about 2:30 o'clock on the morning of June 2, 1881, between Robbins' reef and Bedloe's island, on the westerly side of the channel, in the bay of New York, between the street department scows in tow of the tug-boat Ant and the tug-boat C. J. Saxe, and two pontoons or wreckers in the tow of the said Saxe.

It appears from the allegations of the libel and the proofs that the canal-boat Chandler, loaded with upwards of 200 tons of anthracite coal, and while, with other boats in tow of the steamer Saxe, on a trip from Port Johnson across the bay, being overtaken by a storm foundered and sunk in the neighborhood of Robbins' reef. The owners of the Saxe purchased the sunken boat and her cargo while in this condition, and employed wreckers to raise her. Pontoons were placed on either side of the boat, and four chains were passed under her and tightened by jack-screws on the pontoons. When the tide was low she was lifted from the bottom by the rising of the tide, and was towed by the Saxe, stern foremost with the pontoons, about a mile up the bay, at high water. The bow of the canal-boat again struck the bottom, which stopped their further progress. Being obliged to remain here until the next full tide, the steamer Saxe having the tow in charge dropped back on the east side of the easterly pontoon and made fast, her bow still facing up the river. She then took down her bow and side lights, and set vertically on her flag-staff two white lights, about 15 feet above her deck. One white light was also placed on each of the pontoons on the bow of the west boat, and on the stern of the east one from 10 to 12 feet in height.

On the same morning, at about a quarter of 10 o'clock, the steam-tug Ant left the foot of Thirty-third street, East river, with two street-department scows, loaded with dirt and garbage, in tow by a hawser, bound for the dumping-grounds outside of Sandy Hook. The tug was about 65 long; the hawser leading to the first scow, 500 feet; the hawser from the first to the second scow, 40 feet; and each scow from 75 to 80 feet in length,—making the total length of the tug and her tow upwards of 700 feet. It was a moderately clear, pleasant night; several of the witnesses testifying that vessels could be seen a mile away without lights. The tide was at the strength of the ebb. The Saxe and her tow did not come under the particular observation of the master and pilot of the Ant until they were within a half or three-quarters of a mile distant. The testimony is very conflicting as to the precise distance. Seeing the two vertical white lights on the Saxe and no bow or side lights, he concluded that it was a steamer with a tow, going in the same direction with the Ant. He continued his course, bearing directly upon the Saxe, until he approached her within a few hundred feet.

From the contradictory statements of the witnesses of the respective parties it is quite impossible to tell how near he had come before he

ascertained that the Saxe was not in motion. The master testifies that he did not find out that she was at anchor until he was "right along-side." As soon as he discovered that, he put his helm hard a-starboard, bringing his boat to the east, across the bow of the Saxe, and easily clearing her. The scows, however, being under considerable headway, and carried onward also by the strength of the tide, did not readily yield or respond to the changed course of the tug. The foremost one followed the Ant to the east, barely escaping the easterly pontoon, and struck the bow of the Saxe. The rear scow drifted to the west, and came in collision with the western pontoon. When the master of the Ant first perceived that one of the scows was going to the east and the other to the west of the Saxe and the pontoons, he reversed his engine, and slacked up the hawser, "to give the scows a chance," he says, "to go around if they would." When he found that they would not go around he seems to have hooked up his engine again with the inexplicable intention of disengaging the scows from the pontoons by main force, and pulled upon the entangled mass of boats with such energy that the position of the Saxe and the pontoons was so changed that, instead of lying north and south with the tide, they were turned across the bay from east to west. The last scow had drifted around the bow of the western pontoon, and had engaged with the chain under the bow of the canal-boat. In the violence of the effort of the Ant to get clear, the bow of the Chandler, being aground, was torn away, and some of the timbers and portions of the deck came up, floating on the surface of the water. The libel is filed to recover the damages done to the Chandler, and for the loss of a part of the cargo, consequent upon the injury to the hull.

Two questions at once suggest themselves for consideration:

(1) Was there such carelessness and want of skill in the navigation of the Ant as to cause the collision?

(2) Did the lights exhibited by the C. J. Saxe mislead the Ant and thus contribute to the disaster?

1. I have no doubt about the legal liability of the Ant. It was her duty, being the following steamer, to keep out of the way of the libellant. The tow of the Saxe was aground and helpless, lying on the westerly side of the usual channel down the bay. The weather was favorable for safe navigation. There was not enough wind to excite remark or attract observation on either side. The night was clear, or only slightly obscured, at most, by drifting clouds. There was ample room for the Ant to pass on either side, and no valid

excuse appears why she suffered herself to approach so near to the libellant as to render a collision unavoidable. Upon any theory of the case suggested she was in fault. Being a steamer with a long tow, about to pass another steamer, also with a tow, she ought to have avoided the latter. The excuse rendered by the master for not doing so is that he thought the Saxe was in motion, moving to the south. But vigilance and care on his part would have undeceived him some time before he came so near. He depended upon himself and not upon a lookout; and yet the ascertaining of such facts falls within the proper duties of a lookout. The obligation to have one, independent of the helmsman, on board of steamers navigating in the thoroughfares of commerce, has been so often reiterated by the supreme court that it is no longer an open question. *St. John v. Paine*, 10 How. 558; *Newton v. Stebbins*, Id. 607; *The Genesee Chief*, 12 How. 462; *The Catharine*, 17 How. 177; *Chamberlain v. Ward*, 21 How. 548; *Haney v. Steam-packet Co.* 23 How. 293; *The Ottawa*, 3 Wall. 268.

In *St. John v. Paine*, *supra*, Mr. Justice Nelson, speaking for the court, (p. 585,) said:

"We are satisfied that the steam-boat was in fault in not keeping at the time a proper lookout on the forward part of the deck, and that the failure to descry the schooner at a greater distance than half a mile ahead, is attributable to this neglect. The pilot-house, in the night, especially if dark, and the view obscured by clouds in the distance, was not the proper place, whether the windows were up or down. The view of a lookout stationed there must necessarily have been partially obstructed. A competent and vigilant lookout, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching, at the earliest moment, is indispensable to exempt the steam-boat from blame in case of accident in the night-time, while navigating waters in which it is accustomed to meet other water-craft."

And in *The Genesee Chief*, *supra*, Chief Justice Taney states the law as follows:

"It is the duty of every steam-boat traversing waters where sailing-vessels are often met with to have a trustworthy and constant lookout, besides the helmsman. It is impossible for him to steer the vessel and keep the proper watch in his wheel-house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing-vessel, and it appears that there was no other lookout on board the steam-boat but the helmsman, or that such lookout was not stationed in the proper place, or not actually and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault."

These observations are pertinent to the case under consideration. I am aware that the absence of a lookout is unimportant in all cases where the collision arose from other causes, and such absence did not contribute to the loss or disaster. But it cannot be safely affirmed here that the collision is not directly traceable to the neglect in not having a vigilant lookout. It is true that the master in the wheel-house saw the Saxe and her tow when distant from a quarter to a half a mile—none too soon, with her tow of nearly an eighth of a mile in length, to have avoided her if he had begun at once to make preparations to do so; but, perhaps, soon enough. He made no attempt, however, although having abundance of room on either side, to get out of the way, but continued for six or seven minutes to bear directly upon the Saxe, and did not determine she was stationary until he came within a few hundred feet of her. He then starboarded his helm—a movement which enabled his tug to escape; but any skilful navigator must have known that the momentum of the tow and the force of the tide rendered it impossible for him to pull his tow through without colliding. It was still more faulty navigation, in my judgment, after slackening his speed and finding out that his tow had become entangled with the tow of the Saxe, that he should hook up his engine and endeavor by main force to disentangle them. The damage was caused by this movement, and I have no doubt about the unskilfulness, negligence, and fault of the master of the Ant, and hence the responsibility of the claimants to answer for the damage.

2. Whether the lights exhibited by the Saxe misled the Ant, and thus contributed to the disaster, is a more difficult question to determine. It depends upon the construction to be given to the rules prescribed by congress to prevent collisions on the water. These are found in section 4233 of the Revised Statutes.

The following are the only rules that seem to have any bearing upon the present case:

The *second* is that "the lights mentioned in the following rules, and *no others*, shall be carried in all weathers, between sunset and sunrise." The *fourth* requires that "steam-vessels, when towing other vessels, shall carry two bright white mast-head lights, vertically, in addition to their side lights, so as to distinguish them from other steam-vessels." The *fifth* is that "all steam-vessels, other than ocean-going steamers and steamers carrying sail, shall, when under way, carry on the starboard and port sides lights of the same character and construction, and in the same position as are prescribed for side lights by rule 3." The *tenth* is that "all vessels, whether steam-vessels or sail-vessels, when at anchor in roadsteads or fair-ways, shall, between sun-

set and sunrise, exhibit where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile." The *twelfth* rule relates to canal-boats, oyster-boats, rafts, or other water-craft, and requires, whether such boats are navigating the waters or lying at anchor, that they shall carry one or more good white lights, which shall be placed in the manner prescribed by the board of supervising inspectors of steam-vessels.

The advocates for the claimants insist that the two white vertical lights on the steamer told a false story; that the true construction of the fourth rule requires the vessel with such signals to be in motion, and that only one light should have been shown after the tow had arrested her progress by grounding on the bottom; that the only inference to be drawn from seeing the two vertical lights aloft, and no green and red side lights on the starboard and larboard sides, was that the steamer was towing other vessels down the bay; and that, if such inference had been correct, the collision would not have occurred.

The advocates for the libellants, on the other hand, contend that the fourth rule prescribes that the two vertical lights shall be shown by a steamer when engaged in towing, whether in motion or not; that such lights do not necessarily imply their locomotion, but their occupation; that if temporarily stopped by touching the bottom, neither the law nor the practice of navigation requires the double light to be taken down, but to be left burning, so that all approaching vessels may understand that not only the steamer, but her tow, is to be avoided.

The expert testimony is, of course, conflicting; about an equal number of pilots on each side testifying that the customary and practical interpretation of the rule is in favor of the party which produced them. For instance, Van Deventer, an experienced pilot offered by the libellants, says that in his long experience the only significance he ever knew to be attached to two vertical white lights on the flag-staff of a steamer was that she was a tug-boat having a tow to a hawser. On the contrary, Mr. Gilkinson, speaking as a pilot for the claimants, says that if, while descending the river at night, he saw ahead of him two vertical lights, one over the other, as if on a flag-staff, and on the starboard side of the boat two lights nearer the water, he would understand there was a tow going the same direction with him down the river. And there seems to be a like contrariety

of opinion on the question whether a steamer having a tow and running aground in a public thoroughfare for vessels should continue to exhibit the two white vertical lights, according to the requirements of the fourth rule, or the single white light prescribed by the tenth rule for all vessels lying at anchor in roadsteads. All the pilots who were interrogated on the subject by the libellants considered it their duty to leave the two lights up after grounding, and all who were examined by the claimants were equally positive that custom and good navigation demanded that one should be taken down.

I get quite as little information from any judicial construction. The fourth and tenth rules, as they appear in section 4233, were originally enacted by congress as the fourth and seventh, in the act of April 29, 1864, (13 St. at Large, 59,) and, if possible, must be so construed that both may stand. The fourth prescribes the proper lights for steam-vessels "when towing other vessels;" the tenth, the light that must be exhibited by all vessels, whether steam or sail-vessels, "when lying at anchor in roadsteads or fair-ways." In the one case, there must be "two bright white mast-head lights, vertically, in addition to their side lights." In the other, "a white light in a globular lantern at a height not exceeding 20 feet above the hull."

There is much force in the suggestion of the advocates of the libellants, that the object and purpose of the fourth rule is disclosed in the rule itself. Why should steam-vessels, when towing other vessels, carry two white vertical lights? The rule says, "to distinguish them from other steam-vessels," and not to show that they are in motion. It is important that they should be distinguished from other vessels, from the fact that a steamer with a tow is more helpless and unwieldy than one not thus encumbered, and more care is demanded on the part of vessels meeting or passing them. The rule was adopted from the English act, and support is given to this construction by the observations of Sir Robert Collier, in the case of *The American and the Syria*, L. R. C. P. C. 131. Speaking for their lordships in privy council, on appeal, and considering the provisions of the rule, he said:

"In 1863 an additional article [the rule in question] was promulgated, requiring the towing steamer to exhibit two white lights instead of one; doubtless for the purpose of warning all approaching vessels that she was encumbered, and not in all respects mistress of her movements."

But while this was, without doubt, one purpose of the rule, it is not, in my judgment, the only purpose. It is fairly to be inferred

from its phraseology, interpreted in the light of the provisions of the tenth rule, that the two white vertical lights also signify that the tow is in motion. In navigation, a vessel aground is in circumstances quite similar to a vessel at anchor; and the spirit, if not the letter, of the two rules is best ascertained by holding that a steamer with a tow, whether aground or at anchor, should exhibit the single light required by the tenth rule.

The Ant was misled by the double vertical lights, and was brought into much closer proximity to the tow than she probably would have come if she had been advised by a single light that the Saxe was not in motion. The testimony shows such ignorant or negligent navigation on the part of the master of the Ant that it is doubtful whether he would have cleared the Saxe on an exhibition of the legal signal; but, under the circumstances, I think the claimants are entitled to the benefit of the doubt.

As the Saxe thus contributed to the collision, I must hold her also in fault, and order the damages to be divided; and a decree will be entered accordingly.

LINDSAY, GRACIE & Co. v. CUSIMANO.*

(District Court, E. D. Louisiana. January 14, 1882.)

1. CHARTER-PARTY—"CUSTOMARY DISPATCH."

The meaning of the words "customary dispatch" in a charter-party, relative to the discharge of a vessel, construed and explained. These words, "customary dispatch," mean the usual dispatch of persons who are ready to receive a cargo, and exclude all customs in accordance with which the charterers claim they might, notwithstanding opportunity, decline to receive, simply because it was more advantageous to postpone.

Kearon v. Pearson, 7 Hurl. & N. 386.

2. CUSTOMS OF THE PORT—OBLIGATIONS OF CHARTERERS AND CONSIGNEES.

The customs of the port cannot qualify the obligation of the charterers and consignees to obtain a berth where the vessel could have "customary dispatch."

Smith v. Yellow Pine Lumber, 2 FED. REP. 400.

3. BILL OF LADING—UNLOADING CARGO—CHARGES FOR COVERING CARGO AFTER DISCHARGE.

Where the bill of lading provides that the cargo should be delivered from the ship's deck, when the ship's responsibility should cease, the obligation to protect the cargo, after it was placed upon the wharf, was upon the charterers.

Turnbull v. Blocks of Marble, 9 FED. REP. 320.

The steam-ship Glenbervie, having brought a cargo of fruit from Italy to New Orleans, under a charter-party providing that she should be discharged with customary dispatch, her owners instituted this suit against the consignee to recover demurrage for unusual and unnecessary detention in discharging, and for sundry items of charges made against her by the consignee in settling for the charter-money.

Joseph P. Hornor and Francis W. Baker, for libellants.

Charles B. Singleton and R. Horace Browne, for defendant.

BILLINGS, D. J. The principal discussion in this case has been as to the meaning of the phrase in the charter-party, "to discharge with customary dispatch," and, subordinately, whether the consignees are to pay demurrage for any portion of the 16 days elapsing between the time of the arrival of the ship at the port of New Orleans and the time when the discharging of her cargo was completed. The testimony shows that it is the custom of the fruit dealers at that port to receive their fruit from the vessels no faster than they can sell it at the wharves. The fruit could have been received more rapidly and the discharging been sooner completed, but the consignees declined to receive it in any greater quantities than could

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

be disposed of. This occasioned delay. Is such delay included in the terms "customary dispatch?"

The obligations of the owners and charterers, when the charter-party is silent as to time to be occupied in discharging, are reciprocal; each shall use "reasonable" dispatch. This obligation is here qualified by changing "reasonable" into "customary" dispatch. This enlarges the source of delay, and makes it include all those usages at the port of delivery which the charterers cannot control, such as the working hours, the order in which vessels must come up to the wharf, the observance of holidays, the allowance of three days to obtain a berth, provided one cannot be sooner obtained; but here their force stops. They cannot be held to include any delay which is purely voluntary on the part of the charterers, although such delay is customary in the fruit trade. The phrase must be confined in its meaning to excuse the parties for want of opportunity by reason of the customs prevailing at the port. This is the substance of the distinction in *Kearon v. Pearson*, Hurlstone & Norman, 386. There the question was as to the meaning of the words "usual dispatch," as applied to loading. *Martin*, B., before whom the case was tried, (whose ruling was affirmed by all the judges,) says, page 387, they meant "that the vessel should be loaded with the usual dispatch of persons who have a cargo ready at Liverpool for loading." Here, these words, "customary dispatch," meant the usual dispatch of persons who are ready to receive a cargo, and exclude all customs in accordance with which these charterers might claim the right to decline to receive, simply because it was more advantageous to postpone. If this distinction is observed, all the cases cited are reconcilable. See *Smith v. Yellow Pine Lumber*, 2 FED. REP. 396; *Nichols v. Tremlett*, 1 Spr. 361; and *Sleeper v. Puig*, 17 Blatchf. 36.

During the rain, and for a reasonable time after it ceased, the time should not be counted. According to the construction of the charter-party, which must control, the customs of the port could not qualify the obligation of the charterers and consignees to obtain a berth where the vessel could have customary dispatch. *Smith v. Yellow Pine Lumber*, 2 FED. REP. 400. That is, the custom of discharging cargoes of fruit at or near a particular wharf was not a custom which in the nature of things could exempt them from obtaining a berth when one could be had, where the stipulations of the charter-party could be carried out and the delivery take place with dispatch, limited or qualified by the customs prevailing at the port of delivery which created barriers not under the control of the party who here urges them.

The vessel arrived on the evening or late in the afternoon of January 27, 1880. She finished unloading about 2 o'clock in the afternoon of February 11th. The charter-party seems to show that the unloading would occupy five days, if at the port of New York. It occupied 52 hours, or a trifle over five days, if 10 hours are allowed as the working time for each day. It is difficult to fix with accuracy the time which should be allowed for the rain. I think two days should be added to the five, making seven for unloading, with proper allowance for interruptions from rain. The two Sundays should be deducted. The time of unloading should be counted from the morning of the twenty-eighth of January and include the eleventh of February; this makes 15 days. Deducting five days as proper time for unloading, two days for rain, and two days for Sundays, we have six days remaining, for which libellants are entitled to recover at the rate of £30 per day, amounting to £180, English currency.

The \$25 for hire of tarpaulins, and \$32 for day and night watchmen, were for the protection of the cargo after it had been placed upon the wharf. By the terms of the charter-party the delivery was to be made to lighters, or the responsibility of the ship was to cease after delivery from deck. It is not attempted to be shown that the delivery was more rapid than the consignees could receive, but for their wishing to sell as delivered. The obligation to protect the cargo after it was placed upon the wharf was upon the charterers. These items should therefore be recovered.

The claim for \$33.75, for 15 empty boxes, and the claim for money paid to Bassetti & Xiques, are rejected. The evidence does not show satisfactorily that these claims were not well founded, and the burden is upon the libellants.

Let there be judgment for libellants for \$961.40, with interest from judicial demand.

ALDRICH v. CROUCH, impleaded, etc.

(Circuit Court, N. D. Illinois. February 9, 1882.)

1. REMOVAL OF CAUSE—SHOWING REQUIRED.

It must affirmatively appear on the record, or by facts in the petition, that the case could not have been heard and tried at a term before the application was made.

2. SAME—CONSTRUCTION OF SECTION 3 OF ACT OF MARCH 3, 1875.

The construction of the statute is that if the case is in a condition where it can be tried in conformity with the law and the practice of the court, then an application after that term in which it is in that condition comes too late

3. SAME—APPLICATION UNDER ACT OF 1867.

The statute of 1867 does not permit a citizen of the state in which a suit is brought to make application to remove on account of prejudice, but only the citizen of another state, where the suit is between such citizen and the citizen of the state in which the suit is brought.

A. C. Story, for plaintiff.

George W. Kretzinger, for defendant.

DRUMMOND, C. J. The plaintiff is a citizen of South Carolina, and the defendants are citizens of Illinois. Crouch is the only party who has been served with process and appears in court. An action at law with the usual money counts was commenced in the circuit court of Cook county on the fifteenth day of March, 1881, and on the twenty-fifth day of April following the defendant Crouch filed his plea. Under the law of this state there was a term of the circuit court for every month. The practice act of the state required that the clerk should keep a docket of all the causes pending for each term. There was to be a certain number of cases set for each day of the term, and the cases were to be tried and disposed of in the order in which they were placed on the docket, unless the court, for good and sufficient cause, should otherwise direct. On the twentieth day of October, 1881, Crouch filed his petition for the removal of the case to this court, and gave bond under the act of congress. When the transcript was filed in this court it was, on motion of the plaintiff, remanded to the state court, for the reason that it did not appear from the record that the application for a removal was made in time, within the meaning of the act of congress. After the cause was thus remanded to the state court it was placed at the foot of the trial calendar, and on the twenty-fifth of January, 1882, there was another petition filed in the state court for removal of the cause, and a

bond given under the act of congress, and the transcript has now been presented to this court, and the court is again called upon to determine whether the cause is properly removable.

There is no other objection except that the application was not in time, and we may at present consider the question as if the application were made only under the act of 1875, the third section of which declares that it must be made "before or at the term at which the cause could be first tried, and before the trial thereof." The only difference between the application now and when the cause was before this court on the former application, is that in the second petition which was filed in the state court Crouch says that the cause could not previously have been tried or heard in the circuit court of Cook county. Why it could not have been heard or tried he does not state, and the question for the court to determine is whether, upon this statement, when connected with the other facts disclosed in the record, it can be presumed that the application was made in time under the act of congress; and, I think, it cannot be so presumed, and that the case is not essentially changed from the position which it occupied at the former hearing before this court. It is no further changed than by the above allegation upon the face of the petition, and the court cannot assume that constitutes a sufficient reason why the application was not made before. If we consider it—as perhaps we cannot—an application made on the twentieth day of October, 1881, and not on the twenty-fifth day of January, 1882, I am of the same opinion that I was on the former occasion, that it does not affirmatively appear upon this record, or even by the petition, that the case could not have been heard and tried before the application was made on the twentieth of October; and, of course, for a much stronger reason, before it was made on the twenty-fifth of January of this year. Suppose there must be an issue made up in the case, and the cause is in a condition in which it cannot be heard and tried on account of pressure of business, if the return term has arrived, and the pleadings are filed according to the rules and practices of the court, it is not competent for a party to lie by and allow a term to elapse, and then make his application and say that he is in time. I take it that the true construction of the statute is that if the case is in a condition where it can be tried in conformity with the law and the practice of the court, then an application after that term in which it is in that condition comes too late. Now, it may be that there was a pressure of business, so that the court could not very well try the case. But if that were so, and there were other cases having

priority over it on the docket, it may still have been in a condition where it could have been tried and heard, within the meaning of the statute. The meaning of this statute is not that the court in its regular order, if it proceeded in that way, did not take up the case, but where the court could not take up the case and hear and try it, whatever might be the understanding as to other cases, or of the counsel who were employed in other cases. That seems to be the meaning of the language of the statute, "before or at the first term at which the cause could be tried, and before the trial thereof." This was the construction put upon this clause of the statute in the cases which have been cited, and it was the construction by this court in *Kerting v. American Oleograph Co.*, ante, 17, where one of the parties had a right to set the case down for hearing and did not. Now, in one sense, it had not been set down for hearing; but the reason why it was not was because the counsel did not so choose. It was not competent for a party to decline to set the case down for hearing and then allow a term to pass and make an application subsequently for a removal of the cause.

The application made under the act of 1867 clearly is not within the statute. The application for removal was made by Crouch, one of the defendants, and the only defendant in court. He is a citizen of Illinois. The plaintiff, against whom this application is made, is a citizen of South Carolina, and the statute does not permit a citizen of the state in which the suit is brought to make an application to remove on account of prejudice, but only the citizen of another state, where the suit is between such citizen and the citizen of the state in which the suit is brought. This case will have to go back to the state court, on the ground that the case has not been removed from the state court. *Bible Society v. Grove*, 101 U. S. 610; *Babbitt v. Clark*, 103 U. S. 606; *Gurnee v. County of Brunswick*, 1 Hughes, 270; *Murray v. Holden*, 1 McCrary, 341; [S. C. 2 FED. REP. 740;] *Forrest v. Keeler*, 17 Blatchf. 522; *Kerting v. American Oleograph Co.*, ante, 17.

NOTE. The act of 1875 requires the petition to be made and filed in the state court before or at the term at which the cause could be first tried on its merits, and before the trial thereof. *American Bible Society v. Grove*, 101 U. S. 610; *Ames v. Colorado Cent. R. Co.* 4 Dill. 260; *McLean v. Chicago & St. P. R. Co.* 16 Blatchf. 319; *Fulton v. Golden*, 20 Albany Law J. 229; *Murray v. Holden*, 2 FED. REP. 740; *Huddy v. Havens*, 5 Cent. Law J. 66; *Taylor v. Rockefeller*, 7 Cent. Law J. 349.

It is the evident intention of the act of March 3, 1875, § 3, that if, under the

local law and practice, a case could have been tried at a stated term, a removal cannot be had after the lapse of that term. *Gurnee v. Brunswick*, 1 Hughes, 270; *Danville Banking & T. Co. v. Parks*, 88 Ill. 170; *Carswell v. Schley*, 59 Ga. 17; *Cole v. La Chambre*, 31 La. Ann. 41; *New York W. & S. Co. v. Loomis*, 122 Mass. 431; *Inhab. of School Dist. v. Aetna Ins. Co.* 66 Me. 370; *Watt v. White*, 46 Tex. 338.

If the state law requires that the case be tried at a certain term it cannot be removed after that term, whether the issues are made up or not. *Atlee v. Potter*, 4 Dill. 559.

The first term at which the case can be tried is the term at which there is an issue for trial. *Meyer v. Construction Co.* 100 U. S. 474; *Scott v. Clinton & S. R. Co.* 6 Biss. 529; *Gurnee v. Brunswick*, 1 Hughes, 270; *Green v. Kingler*, 10 Cent. Law J. 47; *Whitehouse v. Continental Ins. Co.* 37 Leg. Int. 225; *Phoenix Life Ins. Co. v. Saettel*, 33 Ohio St. 278.

The term "at which a cause could be first tried" means when the issues are first made up. *Scott v. Clinton & S. R. Co.* 6 Biss. 529.

A case is in a condition to be tried when it is at issue, but a case is not at issue, where the answer requires a reply to be filed, till such reply is filed. *Mich. Cent. R. Co. v. Andes Ins. Co.* 9 Chi. Leg. News, 34.

A cause not at issue as to one defendant may be removed as to him, although it has long been at issue as to the other parties. *Stapleton v. Reynolds*, 9 Chi. Leg. News, 33. As where he has just been served with process. *Greene v. Kingler*, 10 Cent. Law J. 47.

The application must be made when the cause is ready for trial, although the court and parties may not be ready to try it. *Gurnee v. Brunswick Co.* 1 Hughes, 270; *Blackwell v. Brown*, 1 FED. REP. 351; *Chicago, B. & Q. R. Co. v. Welch*, 44 Iowa, 665; *Whitehouse v. Ins. Co.* 2 FED. REP. 493. So, if the case was at issue and could have been tried, but was continued over the term by consent of parties, it is then too late. *Scott v. Clinton & S. R. Co.* 6 Biss. 529; *Stough v. Hatch*, 16 Blatchf. 233. Unless the state law did not require it to be tried at the appearance term. *Palmer v. Call*, 4 Dill. 566.

Under the law of 1867, Rev. St. § 639, par. 3, when the defendant is a citizen of the state where suit is brought, plaintiffs cannot remove the case on the ground of local prejudice if one of them is a citizen of the same state, except where the controversy cannot be settled without the presence of the other plaintiffs. *Bliss v. Rawson*, 43 Ga. 181; *Martin v. Coons*, 24 La. Ann. 169. And see *Bryant v. Scott*, 67 N. C. 391. But a non-resident plaintiff may remove a cause against a citizen of the state in which suit is brought and a citizen of another state, the latter of whom voluntarily appears. *Akerly v. Vilas*, 2 Biss. 110; S. C. 1 Abb. 284; *Sands v. Smith*, 1 Dill. 290; S. C. 1 Abb. 368.—[Ed.]

KARNS and others v. ATLANTIC & OHIO R. Co. and others.*

(Circuit Court, E. D. Pennsylvania. October 19, 1881.)

1. REMOVAL OF CAUSES—JURISDICTION—ACT OF MARCH 3, 1875.

The United States courts have no original jurisdiction under the act of March 3, 1875, (18 St. 470,) in suits between citizens of one state and citizens of the same and of another state.

Demurrer to Bill in Equity.

The bill was filed in the United States circuit court for the eastern district of Pennsylvania by Samuel D. Karns and George C. Howe, both citizens of Pennsylvania, against the Atlantic & Ohio Railroad Company, the Royal Land Company, and the Potomac, Fredericksburg & Piedmont Railroad Company, all three being corporations of the State of Virginia; six individual defendants being the stockholders of said Atlantic & Ohio Railroad Company, one of them being a citizen of Pennsylvania, and the remaining five being citizens of other states, and L. Harry Richards, Jacob H. Walter, and P. Y. Hite, all citizens of Pennsylvania.

The complaint of the bill was, in brief, that complainants, who, as contractors, had built and completed the Potomac, Fredericksburg & Piedmont Railroad, had, on account of financial embarrassments, assigned their contract, together with a controlling interest which they owned in the stock of the Royal Land Company, a corporation which had purchased the railroad, to respondents Walter and Hite, as collateral security for money advanced, and in trust to sell the road, reimburse themselves and the complainants, and pay the surplus to the Royal Land Company; that Walter and Hite had, in conjunction with the Royal Land Company, which they controlled by means of complainants' stock, made, in fraud of the trust, a formal sale and transfer of the said road to respondent L. Harry Richards, for a nominal consideration, but upon a secret trust for their own benefit; that Richards, acting as their agent, had contracted to sell the road to respondents, the Atlantic & Ohio Railroad Company, for \$300,000. Complainants prayed for an injunction to restrain the purchaser from paying the consideration to Richards, and for a receiver to receive the consideration money and hold it until final hearing.

The court, after hearing, granted a preliminary injunction and

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

appointed a receiver. Respondents then filed a demurrer to the bill on the ground that the court had no jurisdiction.

Joseph De F. Junkin, E. Coppee Mitchell, and George Junkin, for complainants.

George Tucker Bispham, for Walter and Hite

George L. Crawford and George M. Dallas, for L. Harry Richards.

T. Elliott Patterson and Hugh W. Steffey, for Atlantic & Ohio Railroad Company.

BUTLER D. J., (*orally*.) When the bill in this case was first presented, it was observed that the plaintiffs were citizens of Pennsylvania, that some of the defendants were citizens of Virginia and some citizens of Pennsylvania. The question of jurisdiction at once presented itself to the court, and the attention of counsel was called to it. Effort was made to obviate the objection by amendment, and the case was argued upon the motion for preliminary injunction. The court did not think the amendment effected any change, and again called attention of counsel to the subject, being reluctant to retain jurisdiction, and especially to grant an injunction, while there was room for serious question as to the jurisdiction. I entertained doubt whether it was not my duty before granting the injunction to consider and pass upon the question, but supposed that inasmuch as counsel for respondents did not raise it, there might be more room for doubt than I saw. I took care, in the opinion, to say that the action of the court was based only upon the questions discussed. Subsequently the question of jurisdiction was raised by demurrer. The impression entertained at the outset has, after listening to the discussion, and after careful consideration, deepened into conviction, which is shared by Judge McKennan. In my judgment the matter is not open to doubt.

Our jurisdiction must be referred to the act of March 3, 1875. The language of the first section of this act is identical with that of the first clause of the second section. The first section has not heretofore called for construction by the courts. The second section has repeatedly, and the decisions of the supreme court upon it have been uniform. In the *Removal Cases*, 100 U. S. 469, although the judges were not unanimous, a majority held that the statute gives jurisdiction only where the controversy is one exclusively between citizens of different states; where all the defendants reside in a state other than that in which plaintiffs reside; that where one or more reside in the same state as a plaintiff, the court has no jurisdiction; that it is only where a controversy exists between citizens exclusively of differ-

ent states that the court has jurisdiction. This construction of the second section must be taken as the construction of the first. The court has in two instances said so.

An argument was pressed upon us, based on the second clause of the second section, intended to show that this clause contemplates a more extensive jurisdiction than I have indicated, as conferred by the first clause of this section. The argument was, that if the second clause conferred such jurisdiction, it must be referred back to the first, for it could hardly be intended that the court should exercise a more extensive jurisdiction in cases of removal than in cases where suit is directly brought in the federal court. In the *Removal Cases*, cited, the court did not feel called upon to construe the second clause of this section. I find, however, in the last volume of reports (*Barney v. Latham*, 103 U. S. 205) a case in which the clause has received a construction by the supreme court, viz., that by it congress intended to import into the act of 1875 the provision of the act of July 27, 1866, (14 St. at Large, 306,) that where there are several defendants, some residing in the same state with the plaintiff and others in different states, and there are several distinct controversies in the suit, the parties to a distinct controversy, residing in different states, may ask for a removal, (*Barney v. Latham*, 103 U. S. 205.) The court further holds that the act of 1875 goes beyond that of 1866, and authorizes the transfer of the entire suit; so that, the parties being as above, and there being a severable controversy between citizens of the same state and between citizens of different states, the act of 1875 authorizes a removal of the entire suit. It is true, therefore, that the second clause of the second section of the act of 1875 does confer in cases of removal a jurisdiction more extensive than that conferred by the first section. This view cannot, however, affect the construction of the first section. But even if the present suit had been brought in a state court, it could not have been removed, because there is here but a single controversy—a controversy between all the plaintiffs and all the defendants,—one in which all are jointly interested.

McKENNAN, C. J., (*orally*.) The conclusion arrived at by Judge Butler is the result of our joint consideration of the question, and I concur in what he has said.

Bill dismissed.

NOTE. If a part of the plaintiffs are citizens of the state where the suit is brought and a part of some other state the defendant cannot remove the suit.

Middleton v. Middleton, 7 Week. N. 144. So, if an action is brought against partners, the case cannot be removed if one of the partners is a citizen of the same state as the plaintiff. *Ruble v. Hyde*, 3 FED. REP. 330.—[Ed.]

EVANS v. FAXON and others.

(Circuit Court, N. D. Illinois. February 13, 1882)

1. REMOVAL OF CAUSE—REMAND.

When the jurisdiction of this court is not clear, from the facts as presented, as to whether one of the defendants, a citizen of the same state as the plaintiff, is a necessary or only a formal party, and there is not a controversy wholly between citizens of different states and which can be fully determined as between them, the case will be remanded to the state court.

George C. Fry, for plaintiff.

McConnell, Raymond & Rogers, for defendants.

DRUMMOND, C. J. The facts in this case, as disclosed by the bill, are that the plaintiff, in 1873, being indebted to Walter Faxon, executed a deed of trust to Joel D. Harvey to secure the indebtedness, and by the terms of the deed of trust the trustee was authorized, upon the non-payment of any of the notes representing the indebtedness, to cause the real property named in the deed of trust to be sold, upon giving notice in the manner pointed out in the deed. The money becoming due and unpaid, the trustee in 1879, at the request of the creditor, gave notice of the sale of the property, and it was accordingly sold to Edwin Faxon for \$2,400; and the bill alleges that the title stands on the record in his name. A bill was filed in the state court on the fifteenth of September, 1881, by the plaintiff, to redeem the land, and to set aside the sale because of informalities, and a non-compliance with the conditions prescribed in the deed of trust, on which alone the power to sell was to be exercised. On the fifth day of November, 1881, the trustee answered the bill, denying that there were any informalities, or that there was a non-compliance with the conditions prescribed in the deed of trust. The plaintiff and the trustee were and are citizens of Illinois. Edwin and Walter Faxon were and are citizens of Massachusetts. The two latter, on entering their appearance in the state court on the sixteenth day of December, 1881, made an application to remove the case to this court, and filed the proper petition and bond, alleging that the trustee

was only a nominal party. A motion is now made to remand the case on the ground that the trustee is a necessary party, and, being a citizen of the same state as the plaintiff, it was not subject to removal.

If the trustee is only a nominal party the case could be removed under the twelfth section of the act of 1879, because the plaintiff is a citizen of Illinois, and the Faxons are citizens of Massachusetts; but if the trustee is a necessary party to the litigation, then the cause could only be removed under the last clause of the second section of the act of 1875.

Under our law the trustee was clothed with the legal title to the land. The bill seeks to redeem the land, and so to revest the title in the grantor.

There are two questions in the case as made by the bill. The *first* is whether the trustee duly executed the power by the sale of the property. The *second* is whether the plaintiff has the right to redeem the land. As the bill attacks the sale made by the trustee and asks that it be set aside, and makes the trustee a defendant, it would seem as though that was a controversy to which the trustee was a party, and that he would necessarily have the right to defend his action, and to show that the power was duly executed. It is said that the trustee being clothed with only the legal title, and having sold the land to Edwin Faxon, the title has passed to him by the sale, although the trustee may not have properly executed the power contained in the deed. And it is further insisted that Edwin Faxon stands in the place of the trustee; and as the rule is that whoever purchases land which a trustee sells under a power contained in a deed is bound to see that the trustee duly executes the power, therefore he is in the same position as the original trustee, clothed simply with a legal title. To a great extent this is perhaps true, because it is clear, if the power has not been duly executed, the purchaser has not acquired a *good* title to the land; but still it is also true that whether Harvey properly executed the power is a controversy in which he is interested, and which is involved in this suit. He sold the property to Edwin Faxon for \$2,400. The necessary inference from the pleadings is that the money was paid to him by the purchaser, and if the sale is set aside because of a non-execution of the power by him as trustee, he would be responsible to the purchaser for the money received from him; and if this case should proceed to decree with Harvey as a party, and the court should find, and so decree, that the power was not properly executed, that would bind Harvey in any proceeding which might be instituted on the part of the purchaser

against him; so that although the bill does not ask for any special relief as against Harvey, still Harvey has necessarily to be a party to the decree which might be rendered in the case, and by which he would always be bound; and it would seem to follow that, because he would be bound by such a decree, he is not a mere nominal party to this litigation.

The language of the last clause of the second section of the act of 1875 is:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district."

Now, it can hardly be said that, in this case, under the allegations of the bill, and with Harvey as a defendant in the suit on answer filed in the state court before it was sought to be removed, that there is in this case a controversy which is wholly between citizens of different states, and which can be fully determined as between them.

In the case of *Ribon v. Railroad Co.* 16 Wall. 446, the railroad company had executed several deeds of trust upon its property, making various persons trustees. An arrangement was made by the railroad company with another railroad company by which a bill was filed by some of the trustees against other trustees and the grantor railroad company, to foreclose the deeds of trust, so that the other railroad company might become the purchaser of the property for a certain price, and be reorganized. Some of the bondholders and stockholders of the company that executed these deeds of trust were not parties to and were dissatisfied with the agreement that had been made between the two companies, and filed a bill to set aside the decree in the foreclosure proceeding, on the ground that it was collusive. The two railroad companies were made parties to this bill, but not any of the trustees or stockholders of the grantor railroad. The supreme court of the United States held that it was necessary that the trustees should be made parties, and affirmed a decree dismissing the bill because they were not. It was admitted that the foreclosure proceedings and decree and sale were regular and valid on their face, and as the trustees were all parties to the decree there would seem to be no doubt that the legal title passed to the purchaser under the decree of foreclosure; but the ground upon which the supreme court held that the trustees were indispensable parties was that if the sale should be annulled they might be called upon and required to refund in the

same manner as a plaintiff who collects a judgment which is afterwards reversed; and as the proceeds of the sale of the grantor railroad were to be divided among its bondholders and stockholders in a certain manner agreed upon between the parties, they might also be required to refund. So in this case, as has already been stated, if this sale is set aside, Harvey, the trustee, may be required to refund the proceeds of the sale. I cannot dispose of this case as though the trustee were not a party to the litigation. He is a party; has answered the bill, defending the sale which he has made, and alleging that it was valid, and that there was a due execution of the power. The only ground upon which the bill of the plaintiff proceeds is that because the sale was invalid he has a right to redeem from the deed of trust. The two things are dependent on each other, and necessarily connected together. *Blake v. McKim*, 103 U. S. 336. So that the jurisdiction of this court not being clear upon the facts as presented, it will be remanded to the state court.

PRESTON v. WALSH, Com'r, etc.*

(Circuit Court, W. D. Texas. January, 1882.)

1. CONTRACT OF THE REPUBLIC OF TEXAS—TRUST.

The contract made by the republic of Texas, acting by Samuel Houston, president, on the eighth of January, 1844, with Charles Fenton Mercer, was valid and binding on the republic. That contract created an express trust in favor of Mercer and his associates, of all the unlocated lands then lying within the limits fixed by the contract, to secure the performance of the contract.

2. ANNEXATION OF TEXAS.

By the compact of annexation the state of Texas assumed all the obligations, liabilities, and duties, including those resulting from the express trust, therefore bearing on the republic of Texas, in relation to said contract with Mercer.

3. CONTRACT—TRUST.

Under the constitution of the United States, and the resolutions and compact of annexation, the state of Texas has been and is without power, by any law, to impair the obligation of the said contract, or the trust resulting therefrom.

4. STATUTE OF LIMITATIONS—TRUSTEE.

Neither lapse of time, nor any defence analogous to the statute of limitations, can be set up by the trustee of an express trust as a defence to his ability to execute the trust.

Hancock v. Walsh, 3 Woods, 351, followed.

*Reported by Joseph P. Horner, Esq., of the New Orleans bar.

5. CERTAIN PROCEEDINGS AND JUDGMENT VOID.

The proceedings had and the judgment rendered in the district court of Navarro county, in the years 1847 and 1848, wherein A. C. Horton, acting governor, for the benefit of the people of Texas, was plaintiff, and Charles Fenton Mercer and associates, unknown, were defendants, were absolutely null and void for want of legal notice to the defendants.

6. TEXAS—CONTRACTS—TRUSTS.

The state of Texas, by law, has never repudiated the contracts with Mercer, or the trust resulting therefrom.

7. EQUITY JURISDICTION—INJUNCTION.

The court of equity has jurisdiction to prevent, by injunction, the waste, alienation, or destruction of a trust estate.

8. JURISDICTION OF FEDERAL COURTS.

While the circuit courts of the United States have no jurisdiction to entertain a suit against a state of the Union, they have jurisdiction of, and will entertain a suit brought by, a proper party against an officer of a state who, under color of his office, but without lawful authority, is wasting, alienating, or destroying a trust estate, although the state may be the trustee and remain silent.

Davis v. Gray, 16 Wall. 203.

9. SAME—EQUITY PLEADING.

In such a suit, where the state is no party, and yet is declared to be the trustee of an express trust, the defendant is without right or interest to plead in defence a repudiation by the trustee, to shield himself from unlawful conduct.

10. SAME—SPECIFIC PERFORMANCE—DECREE FOR TITLE.

Where the relief asked is in the nature of specific performance of the contract, or, at least, a decree for title, it is imperative that the party required to perform, or who holds the legal title, should be before the court; and such party, who is in this instance the state of Texas, not being a party to these proceedings, this court has no jurisdiction to grant such relief.

In Equity.

Brown, Preston, Hancock & West, for complainant.

Peeler & Maxey and Willson & Saines, for defendant.

PARDEE, C. J. Justice Field, on the ninth circuit, in the case of *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.* 1 Sawy. 685, refused to hear questions of law previously determined by the circuit judge in the same case, saying:

"The circuit judge possesses equal authority with myself in the circuit, and it would lead to unseemly conflicts if the rulings of one judge upon a question of law should be disregarded, or be open to review by the other judge in the same case."

The proposition, so evident upon its face, acquires greater force when the circuit judge is called upon to consider the rulings of the circuit justice in the same case. See 2 Fish. Pat. Cas. 120. This case has been before this court for hearing upon demurrer and for injunction

pendente lite, and was heard and decided by my predecessor, Judge Woods, now circuit justice of this circuit. Justice Woods' decision covers many points, is full and elaborate, and is reported by himself in *Hancock*, 3 Woods, 351. The points decided, as stated by the judge himself, are:

(1) A bill filed against the commissioner of the general land-office of Texas to restrain him from allowing locations of land within the limits of a grant made to a party under whom complainant claimed, and which was afterwards confirmed by the state of Texas, is not a suit against the state.

(2) The colonization contract made by the republic of Texas, acting by Samuel Houston, president, on January 29, 1844, with Charles Fenton Mercer, was valid and binding on the republic.

(3) By the terms of the joint resolution of the congress of the United States, for the annexation of Texas as a state in the Union, she was allowed, as one of the conditions of annexation, to retain the vacant unappropriated lands within her limits, to be applied to the payment of the debts and liabilities of the republic of Texas. This resolution having been assented to by the convention of Texas, it is not within her power to refuse compliance with its conditions.

(4) Whether the resolution of annexation and its acceptance by Texas is to be considered as a treaty or contract, it is equally binding on the state, and she cannot escape from its obligations.

(5) A state may become a trustee.

(6) A trust assumed by the republic of Texas was not extinguished by the formation of the state of Texas and the annexation to the Union, but was fastened upon the state as the sovereign successor of the republic.

(7) Neither lapse of time, nor any defence analogous to the statute of limitations, can be set up by the trustee of an express trust as a defence to his liability to execute the trust.

An examination of the full opinion will show that each of these propositions is fully decided upon reason and sustained by authority, as well as many other questions not stated in the syllabus.

So far, then, as any of these questions now come up for consideration in determining the rights of the parties now before the court, they must be taken as settled for this case in this court, if for no other case nor any other court. And for further authority see *Aurora City v. West*, 7 Wall. 99.

Since the decision on the demurrers and the motion for preliminary injunction the complainant has, by leave obtained of the court, filed an amended bill. Said amended bill, in addition to the matters previously alleged in the original bill and in other bills of revivor and supplement, charges:

That the contract between the republic and Mercer created an express trust as to all the lands embraced in the limits assigned to the Mercer colony, which trust has never been satisfied, reversed, abandoned, nor forfeited.

That by the stipulation attending upon the annexation of Texas to the Union an express trust was created upon all the vacant and unappropriated lands retained by Texas to secure the payment of all the debts and liabilities of the republic.

That the rights acquired by Mercer and his associates constituted one of the liabilities recorded by this express trust resulting from annexation, and that the said liability has never been satisfied, extinguished, nor forfeited.

That there was never any intention of the deputies of the people, in convention assembled, to declare any forfeiture of colony contracts, or to establish by any constitutional enactment how and why any forfeiture should be declared; and that no method has ever been declared by law for the forfeiture of such grants and the disposition of the lands.

That, notwithstanding the grant to Mercer and his associates, the defendant and his predecessors in office, without warrant of law, have assumed and pretended to make and issue and deliver certificates and patents for lands within the limits of the Mercer grant to numerous persons not claiming through or under privy of Mercer or the Texas Association, which persons have paid money and made improvements in ignorance of their infringement on the rights of the Texas Association, and that this has been done to such an extent that the remaining lands within the limits of the Mercer grant are inadequate to satisfy the just demands and rights of the complainant.

That complainant is unwilling to interfere with the persons so acquiring rights, as they have expended money and labor in apparent good faith, and an interference would result in great hardship,

That the defendant is violating the preliminary injunction issued in this case, and, confederating with O. M. Roberts, governor of Texas, is issuing certificates and patents for lands in contempt of this court, and to the great injury of complainant.

That defendant, confederating with said Roberts, has procured the passage of an obstruction act by the legislature of the state, which act makes it the duty of the governor to countersign all certificates and patents of public lands.

That the lands within the limits of the Mercer colony, by reason of their location and fertility, are more valuable than the other vacant lands in the state, and that if orator is driven to the other lands to satisfy his claim quantity should compensate for quality.

That under the constitution and laws of Texas, as they existed when Mercer's rights attached, and when this suit was instituted, the records and surveys and plats and maps relating to the public lands were to be kept in a general office, to be under the charge of a general land commissioner, who, upon proper showing, should issue patents for lands under the seal of the state. And that defendant is such commissioner in charge of such office, and that he and his predecessors, though duly demanded, have refused to issue to orator and the Texas Association such certificates and patents as the records of the

land-office clearly show orator and the Texas Association are entitled to have and receive, and that until such delivery of certificates and patents there is no duty devolving upon any other officer or department of the government of the state, nor upon orator, nor the Texas Association, under the terms of the Mercer contract.

And the bill prays—

For a discovery for the perpetuation of the preliminary injunction; for a further injunction restraining defendant, as general land commissioner of the state of Texas, from issuing certificates or patents for any of the vacant and unappropriated lands of the state, within or without the limits of the Mercer colony grant, until orator's just demands are satisfied; for a mandatory injunction compelling the defendants to issue patents to orator for the use of the Texas Association, covering about 2,752 sections of land as grants, premiums, and pre-emptions within the limits of the Mercer colony; or, if not found therein, then for an equivalent from the other vacant lands of the state, and for general relief, etc.

The defendant filed a plea in bar, and a disclaimer and answer, and a motion to dissolve prior to the filing of the amended bill.

After the amended bill he filed a general answer, which, of course, waived his pleas, and the original answer was merged in the last formal sworn answer.

This answer, containing the whole defence exhibited, sets up:

(1) A denial of performance on the part of Mercer and his associates of the various obligations devolving upon them under the contract specifically, to-wit: *a.* That Mercer never introduced settlers, as bound by his contract. *b.* That he never made the surveys, and furnished the plats, maps, field-notes, etc. *c.* That he never built the cabins or small houses. *d.* That he never furnished and kept on hand the ammunition supplies. *e.* That his settlers were not armed with rifle, yager, or musket. *f.* That he did not make the reports required by the contract. *g.* That he and his associates did not obtain the act of incorporation required.

(2) That Mercer and his associates were required by a joint resolution of the republic, approved February 3, 1845, to have the lines of that colony land actually surveyed and marked by April 1, 1845, under pain of forfeiture; and that therein Mercer and his associates failed.

(3) That the map bearing date May 1, 1845, filed with bill marked Exhibit E, appeared to be of recent date, and had been surreptitiously deposited in the office of the secretary of state, without the knowledge or consent of the officer, and that said map was not made in accordance with the contract, did not give the correct boundaries or limits, and took in about 3,000 square miles more than the contract covered.

(4) That the contract was made against the will and in contempt of the people of Texas, having been made after both houses of the legislature had passed a bill repealing the authority theretofore given the president to make such contracts, and only the day before such bill became a law by passing

over the veto of the president, and that Mercer was well aware of the opposition of the people, as he was present attending on the session attempting to procure from the congress an extension of the Peters contract, in which he was interested.

(5) That the opposition of the people continued, and that the convention of 1845 adopted an ordinance denouncing colony contracts as unconstitutional and void, and as operating a monopoly, to the exclusion of citizens, soldiers, and creditors of the republic, and providing that it should be the duty of the attorney general of the state, or the district attorney of the district in which any portion of the colonies might be situated, as soon as the organization of the state should be complete, to institute legal proceedings against all colony contractors, and providing that if any contracts should be found, upon such investigation, unconstitutional, illegal, or fraudulent, or that the conditions had not been complied with according to its terms, such contract should be adjudged null and void, but without prejudice to actual settlers. That said ordinance was adopted by a vote of the people, and thereby became a part of the fundamental law of the land, and that the state organization was completed February 16, 1846. That in obedience to said ordinance J. W. Harris, attorney general of the state of Texas, on the eleventh day of October, 1846, filed a suit in the district court of Navarro county, in which county part of the Mercer grant was situated—a suit in the name of A. C. Horton, governor of the state, for and on behalf of said state, as plaintiff, against Charles Fenton Mercer and his associates, as defendants, alleging non-performance on the part of said Mercer and his associates, and illegality and unconstitutionality from the beginning, and praying that the contract be declared null and void from the beginning. That said Mercer and his associates were duly and legally cited to appear and answer; and that thereafter, at the September term, 1848, the said suit was fully heard and determined, and it was fully and finally adjudged and decreed, upon the verdict of a jury, that the said contract of January 29, 1844, was null and void. That such judgment is still in full force, unreversed, and unavoids.

(6) That the parties in that suit are identical in interest and privity with the parties to this suit, and that the subject-matter is the same; that Navarro county had jurisdiction; that Mercer and his associates were represented and had a fair trial; and that the said judgment has the force of the thing adopted, and the same is a full and complete bar to this action.

(7) That the state has never, by the act of February 3, 1850, nor by the act of August 12, 1870, nor by any other act, recognized the validity of the Mercer contract. On the contrary, it has always acted on the theory of its invalidity, and all legislation in relation to its public lands, or in relation to relief to actual settlers in the Mercer colony limits, has stipulated against the contractors taking any benefit from the legislation.

(8) That no trust has ever been created in favor of Mercer and his associates; no title has ever vested; no possession has been had; and that the complainant nor the Texas Association are not entitled to any of the public lands by reason of said contract, either for settlers or for premiums.

(9) That defendant is a sworn and bonded officer, governed by the laws of the state, and that by law, approved April 19, 1877, when questions may arise

he is obliged to consult the governor and follow his advice. That in this matter he has advised with Hon. O. M. Roberts, governor, and has been instructed by the governor not to issue any certificates for land to said Mercer and associates, and to those claiming by or through or under them, and that he is advised and believes that it would be a breach of his official bond and a violation of his official oath to issue any such certificates to complainant or the Texas Association.

(10) That William Preston, complainant, has no authority to stand in judgment in this suit; that the members of the Texas Association are the proper parties to this suit; and this suit is defective for want of such parties.

(11) That the settlers in the limits of Mercer colony are interested in the lands claimed, and that the bill is defective for the want of such parties.

(12) Pleading the statutes of limitations and staleness of demand, denying secrecy and fraud, but claiming open and notorious repudiation by the state of complainant's demands.

And the defendant denies conspiracy with the governor, denies having infringed the injunction in this case, and makes all the discovery that defendant finds possible in the premises.

To this answer a general replication is filed by the complainant. This statement of the pleadings, taken in connection with the full statement of the pleadings and facts as reported in the case of *Hancock v. Walsh*, to which reference is made, shows the issues presented to this court. The evidence offered and admitted on this hearing is bulky and voluminous, and cannot be recapitulated here, even if necessary. The following may be taken as the substance, and it will be found sufficient to understand and support the decree allowed in the case.

The complainant has established the contract between the republic, through Sam Houston, president, and Charles Fenton Mercer, and his associates, as alleged in the bills; the entrance of Mercer upon the duties devolving on him under the contract; the organization of the Texas Association; the appointment of surveyors and colonization agents; the running of lines and surveys; the introduction of 119 families within the first year of the grant; the making of the survey of the boundary limits of the colony grant by April 1, 1845; the settlement of 1,256 families within the limits of the colony prior to October 25, 1848; the appointment of Mercer as chief agent and trustee for the association; the subsequent appointment of Hancock as chief agent; Hancock's death and the appointment of Preston, ratified by the association, as chief agent; the entrance of the gentlemen upon the performance of their duties as agents of the association, and the activity displayed by them, respectively, in furthering the objects and interests of the colony and the association; the employment of counsel, the expenditure of money, and the persistent applications made to the political department of the state of Texas for relief. Further, the complainant has shown that Mercer, as agent, made reports, as required by

contract, up to and for the year 1847, to the government of Texas; that Mercer is dead long since, and that all his papers and documents, among which were copies of his correspondence and reports in relation to the Mercer colony, have been lost and destroyed.

In short, the substance of the original bill is established.

There are only two points questioned seriously as not yet proved:

- (1) Preston's right to act as chief agent and represent the association.
- (2) The proof of the settlement of 1,256 families prior to the expiration of the grant.

As to the first point it is shown that Hancock was chief agent, in accordance with the articles of association, with power to substitute; that he died, and in his last will and testament transferred his shares to Preston and appointed Preston chief agent. It is shown that Preston assumed the duties of chief agent, and that his assumption has been approved and ratified by the other shareholders. Any defect of Preston's authority to represent the association has been cured by ratification. It is elementary in the law of agency that ratification of the acts of an agent amounts to as much and has the same effect as an original appointment. The proof of the introduction and settlement of 1,256 families is made by Crockett's report. Under the act of February 2, 1850, Crockett was the sworn and bonded officer, and agent of the state to issue patents to such of the settlers of Mercer's colony as were intended to be relieved by the act. Under the law he could only issue certificates to such colonists as proved by their own oaths, supported by the oaths of two respectable witnesses, that they emigrated to Texas, and became citizens of the Mercer colony prior to October 25, 1848. Crockett's own sworn report shows that 1,256 families made such proof to his satisfaction, and that he issued certificates as required by the law. Now, it was covenanted in the contract between the republic and Mercer that all the unlocated lands lying in the limits of this colony grant at the date of the grant should be exclusively set apart and reserved for five years, for the use of Mercer and his associates, to be colonized by them under the contract.

The depositions of Pillons and others show that at the date of the contract there were very few, if any, locations within the Mercer colony limits. There is no direct evidence to show whether the 1,256 families, proved by Crockett to have settled prior to October 25, 1848, were all, or any of them, introduced by Mercer or the Texas Association. Nor is there any proof to show the negative. The families were there and settlers. They could only be there lawfully under Mercer and the Texas Association. In the absence of proof, it is a

strong presumption that they were settlers there lawfully; that is, under Mercer and the Texas Association, not as trespassers and squatters. Besides this presumption, I do not regard it as absolutely necessary that every settler who located in the Mercer colony should have been previously personally solicited and induced thereto by Mercer or his agents. The contractors could not have so contemplated. One settler would naturally induce others, and the advertisements and maps and advantages and improvements would certainly aid in the scheme of colonization and settlement.

The depositions offered by the defendant upon this subject (which are amenable to the charge of incompetency, as hearsay evidence, and though given full force as evidence) are not strong enough to rebut this presumption in favor of law and order. The witness knew, had heard, of no one who claimed to have been induced to settle by Mercer or his agents, or under the Mercer colony grant. And it might be noticed, under the law of 1850, it was not necessary, in order to receive the donation offered by the state, that they should claim under Mercer. And it is plausible to say that, under the hostile attitude evinced by the people of the state at that time towards the colonization contract, many settlers might have been deterred from claiming under obnoxious titles, particularly when such claim was wholly unnecessary.

The allegations in the amended bill of complainant are also, in the main, established, except in relation to the conspiracy alleged between the defendant and Gov. Roberts, and in relation to the charge of contempt for violation of the injunction heretofore issued in the case. Upon this last-mentioned matter the proof fully exonerates the defendant.

The defendant shows by the depositions of various witnesses, mostly old settlers, that Mercer and his associates had not complied with the various stipulations and details of the contract in many small matters, so far as the knowledge of the witnesses extended; but this evidence is negative, and at this late date it can hardly raise a presumption even of non-compliance. In relation to this it may be well to notice that by the terms of the contract a forfeiture or determination of the contract was only to result from non-performance, on the part of Mercer and his associates, in relation to the introduction of a certain number of families within certain fixed periods,—for instance, 100 families by May 1, 1845; 250 families within two years; and 150 families within each of the remaining three years the contract

was to run. And further, that no default or determination was to operate otherwise than prospectively. The defendant fails to show the truth of his charge in regard to the survey of 1845 and the manufacture of the map of that date.

The remaining allegations of defendant's answer—leaving out arguments and conclusions of law therein contained—may be considered as substantiated. The proceedings in the Navarro county court are proved, with the variance that the suit was brought in the name of A. C. Horton, acting governor, for the benefit of the people of Texas, instead of, as alleged, in the name of A. C. Horton, governor, for and on behalf of the state of Texas, and that there is no proof of service by publication or otherwise on the defendant. It is true that the record produced shows that service by publication was ordered by the court and by the sheriff, but it does not show how, where, or when publication was made, or that it was made at all. The recital in the alleged judgment of the words, "and it appearing to the court that service had been perfected," cannot cure the defect. As I understand the law, the record must show affirmatively that the forms of service provided by law have been complied with, before the judgment of a court, otherwise having jurisdiction, can have the force of the thing adjudged.

Certainly the insertion in the judgment of a few words cannot have the talismanic effect of supplying the want of service. I am not at all certain but that the many other glaring defects on the face of the record, so far as proved, or so ably argued by counsel, strike the entire proceedings in Navarro county with absolute nullity. The defects are most certainly very serious relative nullities.

Now, taking the facts as I have found them to be disclosed by the evidence, I am satisfied that the following propositions of law, as applicable in this case, are clearly maintainable:

(1) The contract made by the republic of Texas, acting by Samuel Houston, president, on the eighth day of January, 1844, with Charles Fenton Mercer, was valid and binding on the republic.

(2) That contract created an express trust in favor of Mercer and his associates of all the unlocated lands then lying within the limits fixed by the contract to secure the performance of the contract.

(3) That by the compact of annexation the state of Texas assumed all the obligations, liabilities, and duties, including those resulting from the express trust theretofore bearing on the republic of Texas in relation to said contract with Mercer.

(4) That under the constitution of the United States, and the resolutions

and compact of annexation, the state of Texas has been and is without power by any law to impair the obligation of said contract or the trust resulting therefrom.

(5) Neither lapse of time nor any defence analogous to the statute of limitations can be set up by the trustee of an express trust as a defence to his ability to execute the trust.

(6) That while the ordinance adopted by the convention in 1845, (Hartley's Dig. 84,) afterwards ratified by a vote of the people, may have conferred power upon the law officers of the state to sue for, and jurisdiction on the courts to force forfeitures on, the colonization contracts, yet that the proceedings had and the judgment rendered in the district court of Navarro county, in the years 1847 and 1848, wherein A. C. Horton, acting governor, for the benefit of the people of Texas, was plaintiff, and Charles Fenton Mercer and associates, unknown, were defendants, were absolutely null and void for want of legal notice to the defendants.

(7) That the state of Texas by law has never repudiated the contracts with Mercer, or the trust resulting therefrom.

(8) That the court of equity has jurisdiction to prevent by injunction the waste, alienation, or destruction of a trust estate.

(9) That while the circuit courts of the United States have no jurisdiction to entertain a suit against a state of the Union, they have jurisdiction of, and will entertain a suit brought by a proper party against, an officer of a state, who, under color of his office, but without lawful authority, is wasting, alienating, or destroying a trust estate, although the state may be the trustee and remain silent.

(10) That in such a suit, where the state is no party, and yet is declared to be the trustee of an express trust, the defendant is without right or interest to plead in defence a repudiation by the trustee, to shield himself from unlawful conduct.

The first five of these propositions of law are laid down by Judge Woods, well supported by authority, and, as I have shown, *supra*, are the law of this case. The sixth proposition is undisputed law. *Hollingsworth v. Barbour*, 4 Pet. 476; *Harris v. Hardeman*, 14 How. 343; see *Goodlove v. Gray*, 7 Tex. 483; *McCoy v. Crawford*, 9 Tex. 353; *Blossman v. Letchford*, 17 Tex. 647; *Hill v. Faison*, 27 Tex. 428; *Johnson v. Herbert*, 45 Tex. 304; and the case of *Treadway v. Eastburn*, lately decided, (not reported.) The seventh proposition is shown by an examination of the various laws of Texas cited on both sides in this case, and I might with safety go further than I have, and say that under section 10, art. 1, of the constitution of the United States, the state could pass no valid law impairing the obligations of Mercer's contract. The eighth and ninth propositions are fully sustained by the decision of the supreme court in the case of *Davis v. Gray*, 16 Wall. 203. The tenth proposition is a corollary legitimately following the decisions in *Davis v. Gray* and *Hancock v. Walsh*. The

fact is that these two last-mentioned cases furnish nearly the entire law of this case. At the same time I deem it proper to say that nearly every proposition involved herein, I believe, from the examination I have been able to make, and from the authorities cited in argument by the distinguished counsel on both sides who have aided in this case, can be and is fully sustained by Texas authority, as declared by the supreme court of the state.

Now, applying the law as I understand it to the facts of this case, I think it clearly follows that complainant is entitled to a decree in his favor embodying such relief as he has asked and the court has jurisdiction to give. He asks for an injunction restraining the defendant, as commissioner of the general land-office of the state, his servants, agents, employees, etc., from issuing, passing, or granting any certificates or patents for lands lying within the limits of the Mercer colony to any person or persons other than the complainant or the Texas Association, and persons holding and claiming under or in priority with the said association; and restraining the defendant, etc., from hindering and obstructing complainant in the execution and performance of the Mercer contract, and in obtaining the certificates and patents of lands to which the complainant and the said association are entitled under the terms and conditions of said contract. The relief is within the jurisdiction of the court, and is after the manner of the proceedings in equity. The complainant asks further for a mandatory injunction to restrain the defendant from refusing to issue to complainant patents and certificates for 1,376 sections of land to which complainant is entitled under the contract, by reason of settlers introduced thereunder, and to 1,376 sections of land to which he is also entitled under said contract by tendering in payment thereof \$12 in coin and scrip to the amount of \$640, or its equivalent in money, for each section, and restraining said defendant from hindering him from locating the said certificates and patents upon any of the vacant and unoccupied lands of Texas within or without the limits of the Mercer colony, etc. This relief, no matter how just, I conceive to be beyond the jurisdiction of the court in this case for want of proper parties.

The whole theory of this case is that the contract with Mercer created an express trust, which, by operation of law and compact, devolved upon the state of Texas; that the state of Texas is now the trustee, the Texas Association the *cestui que trust*; that the legal title is in the state, the equitable title in the association. It has been vehemently alleged by complainant and adjudged by this court that

the state is not a party to this suit. The relief asked is in the nature of specific performance of the contract, or, at least, amounts to a decree for title. For the court to grant such relief it is imperative that the party required to perform, or who holds the legal title, should be before the court. Pomroy, Specific Performance, § 483 *et seq.*; Daniell, Ch. 194, 196; Perry, Trust, §§ 873, 874. See Justice Field in 1 Sawy. 685. And authorities can be multiplied to any extent. It will be noticed, too, that under the contract, after the performance of certain conditions precedent, (with regard to survey and selection of sections,) it is the government of Texas that is to convey or cause to be conveyed the title to the lands surveyed and selected. To grant the relief asked would be to compel the conveyance of title from the state to complainant of unlocated and unsurveyed lands, and allow the location and survey of any of the vacant lands of the state, which I conceive to be wholly outside of the contract; and, besides, would be taking practical possession, under this and other injunctions asked, of the land-office of the state.

In *Hancock v. Walsh* Judge Woods says:

"This is not a suit against the state, and does not seek to deprive her of the power of disposing of her own lands in her own way, for the lands which the complainant seeks to appropriate are not the property of the state." 3 Woods, 366.

Under the act of May 12, 1846, (section 3952 of the Code of 1879,) which was in force at the institution of this suit, it was required that "every patent for land emanating from the state should be issued in the name and by the authority of the state, under the seal of the general land-office, and shall be signed by the governor and countersigned by the commissioner of the general land-office."

In the act of 1879, denominated by counsel as the "obstruction act," it is provided that before any certificate for land reserved by the commissioner of the land-office, in cases where the commissioner has doubts or where there is a suit to compel or restrain the commissioner in the issuance of certificates, shall have any force or effect, the same shall be submitted to and be countersigned by the governor of the state.

It is urged that this obstruction law must be disregarded, because passed since the institution of this suit, with a view to affect the remedies to be granted by the court, and that it impairs the vested rights of complainant under his contract. I am not prepared to say that complainant, under the Mercer contract, acquired any vested right as to the forms and manner in which the title of the republic

was to pass or be conveyed. If he did he is remitted to the laws in force at the time of the making of the contract. An examination of the laws of the republic, in force at the making of the contract, fails to show any authority for the commissioner to issue land certificates. Many other officers and boards could issue them, but not the commissioner. The contract itself provides for no certificates to be issued by the commissioner. As I view the matter, therefore, under the laws of Texas, to operate the conveyance of title emanating from the state to public lands, either by patent or certificates, the act of the governor of the state is necessary, and the governor is no party to this suit.

The case of *Davis v. Gray*, affirming *Osborne v. U. S. Bank*, on the subject of making, and requiring the state to be made, a party where the state is concerned, is very strong, and I feel bound to go as far as that case; but I must leave to the supreme court to go further, or declare the law that the courts of the United States can go further.

Article 11 of the amendments to the constitution of the several states was adopted in the interest of and for the protection of the several states. To construe it so as to allow the property of a state to be alienated or conveyed in a suit against a subordinate official of the state, is not only to nullify the amendment, but to put the state in a worse plight than if the amendment had not been adopted, for without the amendment the state would always have her day in court.

The complainant also asks an injunction to restrain the defendant, as land commissioner of the state, from issuing any further patents and certificates for any of the vacant and unlocated lands of the state beyond and outside of the Mercer colony limits to any person whatsoever, until the just demands of the complainant arising under the Mercer contract and the public trust, created by the compact of annexation, to hold the public lands for the payment of the debts and liabilities of the republic, are fully compensated and satisfied. This demand involves the proposition that the treaty or compact of annexation created such a trust in favor of the creditors of the republic as could be enforced in the courts of equity; in other words, that it contemplated that any creditor might sue the state and obtain a decree for the sale of sufficient of the public lands to satisfy his demand. I doubt if any such trust was contemplated or created, particularly in the face of the inhibition of the constitution of the United States as to the right to sue a state in the courts. That a great public trust was created, that the public faith was pledged, that the state of Texas may be bound in morals and good faith to apply the public lands as stipulated in the treaty, I agree; but I doubt the power and authority

of the circuit court of the United States, sitting as a court of chancery, to enforce these obligations.

The learned solicitors for the defendant have, with great ingenuity and force, argued to the court several propositions that I will merely advert to. They claim that no injunction should issue in this case, as it would be a vain and useless order, so far as giving any relief to complainant is concerned. It does not seem so to me. Preventing the further waste of the trust estate, preventing further clouds from being thrown on complainant's equitable title, and preventing defendant from further obstructing complainant in the assertion of his rights, would seem considerable, valuable, and effective relief.

It is further said by the solicitors that complainant should be remitted to the political department of the state government for the relief his case demands. I do so remit him, but at the same time I grant the relief (as I am bound to do) that I find he is entitled to from the court, and the court aids him to protect his property until the conscience of the political department is moved, and the said department can see its way clear in the premises.

It has been urged, and, in fact, charged in the answer, that many innocent persons have acquired equitable titles to lands in the limits of the Mercer colony, and that to continue the injunction will operate a loss and hardship. No proof is made, but, taking it to be true, there is no suggestion that any of these equitable titles are of a higher nature or of earlier date than complainant's titles. It shows the more forcibly the necessity for the action of the political department of the state, but shows no sufficient reason for this court to deny complainant the relief that equity and good conscience require.

For these reasons, and many others that might be given, and well knowing that any errors that I may make, either in granting or in denying the full measure of relief, can and will be revised and corrected by the honorable, the supreme court of the United States, I consider it my duty to pass the accompanying decree. And it is so ordered.

NEW ORLEANS NAT. BANKING ASSOCIATION *v.* P. S. WILTZ & Co. and
another.*

(Circuit Court, E. D. Louisiana. July, 1881.)

1. CAPITAL STOCK.

Stock in an incorporated company in Louisiana is property, and not a credit; and it is transferable and salable by actual contract thereto, and a delivery of the certificate.

Smith v. Slaughter-house, 30 La. Ann. 1378.

2. SAME—PLEDGE—LIENS AND PRIVILEGES.

It can, therefore, be pledged by contract and the delivery of the certificate, and when pledged in this manner the pledgee takes it subject to all the liens and privileges the law puts upon it; but no lien or privilege can attach except by or under operation of law.

3. GENERAL INCORPORATION LAW.

The charter of a company, formed under the general incorporation law, cannot create any privilege unknown to the law of the state, unless the power was expressly given in the general law, which it is not.

In Equity.

John D. Rouse and William Grant, for complainant.

Alfred Grima, for defendant insurance company.

PARDEE, C. J. The bill of complaint herein sets forth that the said complainant was, on the twenty-eighth of February, 1873, the holder and owner of a certain promissory note drawn to their own order, and indorsed by said defendants P. S. Wiltz & Co., for the sum of \$12,000, and payable 90 days after date; that in order to secure said note the said P. S. Wiltz & Co. pledged to complainant 50 shares of the capital stock of the defendant the New Orleans Mutual Insurance Association, and delivered the certificate of such stock to complainant, the said shares of stock then standing in the name of said P. S. Wiltz & Co. upon the books of said association; that said note was renewed several times, the said stock always remaining in possession of complainant as a security for said debt, until on the eighth of December, 1873, the amount due on said note was evidenced by the note sued on herein for \$12,000, dated December 8, 1873, and payable 30 days after date, drawn by said P. S. Wiltz & Co. to their own order, and by them indorsed; that said defendant the insurance association had notice of said pledge, and that it has in its hands a large amount of accrued dividends due on said shares of stock; that complainant has demanded from said association and

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

requested the said association to permit the transfer of said stock in order to realize thereon, as the cashier or president of complainant bank was authorized, under said act of pledge, to make such transfer, but that the said insurance association declined to accede to the complainant's demands. And complainant, therefore, prays that an account be taken of the amount due it by said defendants P. S. Wiltz & Co.; that it be decreed to have a lien and right of pledge upon the said shares of stock, and the accrued dividends thereon; that the said stock be ordered to be sold, and the insurance association directed to make the necessary transfer thereof upon its books, and that complainant be paid by preference the amount realized by the said sale, together with the amount of said accrued dividends, to be applied by complainant in extinguishment of the said debt of Wiltz & Co.

The defendant the New Orleans Insurance Association answered, denying the validity of the act of pledge herein declared on, upon the grounds that the same was informal, and that it had not been recorded as required by the laws of this state, and that it conferred no privilege on the said stock; that said insurance association had not been notified of the said pledge. They further answered that they had refused to make the transfer of stock and dividends claimed by complainant, upon the ground that the said defendants P. S. Wiltz & Co. were indebted to them, and that under their charter no transfer of stock can be made nor dividends thereon paid while the holder of said stock is indebted unto the said insurance association; that on the thirteenth day of April, 1874, the said insurance association obtained a judgment against said Wiltz & Co. for the sum of \$20,000 and interest, and that said shares of stock were seized under execution thereon and sold on May 21, 1878, and realized the sum of \$1,150.15; that they had a lien upon said stock to secure the said indebtedness of Wiltz & Co. to them. They further aver that the president and several of the directors of complainant corporation were directors in said insurance association, and had full notice of said provisions of charter, and of the indebtedness of Wiltz & Co. to the insurance association. They admit that the sum of \$925 accrued as dividends upon said stock during the years 1873, 1874, 1875, 1876, 1877, and 1878. A general replication was filed to this answer by complainant, and the defendants P. S. Wiltz & Co. having failed to answer, the bill has been taken as confessed as to them.

The proofs and admissions in the record show the indebtedness of P. S. Wiltz & Co. to complainant as alleged, and that the above-described shares of stock were pledged to complainant, and the certificate of such

shares of stock delivered to complainant, as set forth in bill of complaint herein. It also appears that said Wiltz & Co. were indebted unto said insurance association in the sum of \$20,000, with interest, and that on the thirteenth of April, 1874, said association obtained judgment against said Wiltz & Co., in the fifth district court for the parish of Orleans, for said sum, *but without any recognition of a lien upon said stock*; that subsequently said stock was apparently sold, as set up by said association in the answer herein, but that neither the said insurance association, nor the sheriff, nor the purchaser at said sale, had possession of the certificate of said shares of stock, which always remained under the control and in the possession of complainant; and that the transfer of said stock to the purchaser at said sale was made without the authority or consent of said P. S. Wiltz & Co., or of complainant. The charter and amended charter of the insurance company are shown, as set forth in the answer.

The counsel in this case have gone over a good deal of ground, and have filed very able and exhaustive briefs on each side. The view I take of the case does away with the necessity of examining all the authorities cited.

The case arises under Louisiana law, and many of the cases cited are not in point. Stock in an incorporated company in Louisiana is property, not a credit. *Smith v. Slaughter-house*, 30 La. Ann. 1378. It is transferable and salable by actual contract thereto, and a delivery of the certificate. *Id.*

It can, therefore, be pledged by contract and the delivery of the certificate. *Blouin v. Hart*, 30 La. Ann. 714; *Factors' & Traders' Ins. Co. v. Dry Dock*, 31 La. Ann. 149. When pledged in this manner, the pledgee takes it subject to all the liens and privileges the law puts upon it. No privilege can attach except by or under operation of law. Where the law gives no privilege, none can be given by contract or consent. *Succession of Rousseau*, 23 La. Ann. 3; *Hoss v. Williams*, 24 La. Ann. 568. The insurance company was formed under the general incorporation law of the state by public act passed, before a notary. It has no legislative charter. This charter could not create any privilege unknown to the law of the state, unless the power were expressly given in the general law, which it is not. The general law authorizes corporations to "even enact statutes and regulations for their own government, provided such statutes and regulations be not contrary to the laws of the political society of which they are members." La. Civ. Code, art. 433.

But this cannot be construed to authorize a corporation by char-

ter, or by by-law or statute, to create a privilege on property actually and necessarily within commerce.

The case of *Bryon v. Carter*, 22 La Ann. 98, is in point. In that case the by-law of the bank was of as much force as the charter, in this: because the act of 1855, § 8, in relation to free banks, gave authority to the corporation to direct the manner of the transfer of bank stock on its books, and it is noticed that the by-law in that case is almost identical with the provision relating to transfer in this. See, also, *Bulland v. Bank*, 18 Wall. 589; *Bank v. Lanier*, 11 Wall. 369.

In the case of *Driscoll v. Bradley Manuf'g Co.*, 59 N. Y. 96, where a lien was claimed under a by-law of the corporation, the court lays down this proposition: "Hence, if the defendant is to maintain this by-law, it must point out the authority, either in its articles of association, and show that they are authorized by law, or in some statute."

I take it that the law in this state is the same. The insurance company, to prevail in this case, must show its authority for the restrictive provision in its charter in some statute or law of the state.

In addition to this, under article 123 of the Louisiana constitution of 1868, in force at the time of the transactions under consideration, the privilege claimed by the insurance company should have been recorded, to have had any effect against third persons. And it should have been recorded, too, in the registry of mortgages and liens and privileges. L. C. C. art. 3388. Recording in any other book would not preserve the privilege. See Louque's Dig. 613, and authorities there cited.

The evidence filed only shows a general recordation of the charters of the insurance company in the society books kept for that purpose. See certificates of recorder attached to charters on file.

MASON, Adm'r, etc., v. HARTFORD, PROVIDENCE & FISHKILL R. Co.
and others.

(Circuit Court, D. Massachusetts. February 4, 1882.)

1. EQUITY PLEADING—SPECIAL REPLICATIONS.

A special replication which sets up in reply to a plea or a demurrer new matter, and matter accruing since the filing of the bill, will be ordered stricken out, on motion.

2. EQUITY PRACTICE—AMENDMENTS.

New matter accruing since the bill was filed cannot be incorporated into the bill of revivor by amendment.

3. CASE STATED.

To a bill of revivor, filed by the alleged administrators and trustees of the original complainant, a plea was put in setting up that it did not appear by the bill that the plaintiffs had ever been appointed administrators by a court of competent jurisdiction. A demurrer was filed to the bill by another defendant, on the same and other grounds. *Held*, that a replication setting out that since the filing of the plea and demurrer the plaintiffs had been appointed administrators by a court of competent jurisdiction, could not be sustained; and that such matter could not be set up by amendment.

In Equity. Decision upon defendants' motions to strike replications from the files, and to dismiss bill of revivor, and upon complainants' motion to withdraw replications, and amend bill of revivor.

T. E. Graves, John F. Tobey, and A. & A. D. Payne, for plaintiffs.

S. E. Baldwin, Ropes, Gray & Loring, Brooks, Ball & Storey, G. W. Baldwin, and E. P. Nettleton, for defendants.

COLT, D. J. In this cause a bill of revivor was filed August 14, 1880, by the alleged administrators and trustees of Earl P. Mason, the original complainant. To this bill one of the defendants, William T. Hart, put in a plea, setting up that it did not appear by said bill of revivor that the plaintiffs named therein had ever been appointed administrators of said estate by any court of competent jurisdiction in the state of Massachusetts, and that therefore the plaintiffs had no right to file said bill, that the court had no jurisdiction thereof, and praying that the bill might be dismissed. The New York & New England Railroad Company, another defendant, demurred to the bill upon this as well as other grounds. To this plea and demurrer the complainants in the bill of revivor filed separate replications, setting out, among other things, that since the filing of the plea and demurrer they had been appointed administrators of the estate of the said Earl P. Mason in the state of Massachusetts.

The defendant William T. Hart now moves—*First*, that the replication to his plea be stricken from the files, because it is special, and sets up new matter, and matter accruing after the filing of the bill of revivor; and, *second*, that the bill of revivor be dismissed, because the complainants have not taken issue on the plea, nor set the same down to be argued, though the same has been filed more than a year.

The New York & New England Railroad Company also move that the replication to the demurrer be stricken from the files, and that the bill of revivor be dismissed, because the complainants have not set the demurrer down for argument, though filed over one year before.

It is apparent that the replications here filed are special, setting up new matter, and matter accruing since the filing of the bill of revivor; therefore they are irregular. By equity rule 45, of the United States court, "no special replication to any answer shall be filed."

In *Vattier v. Hinde*, 7 Pet. 252, 274, the supreme court declare that no special replication can be filed except by leave of the court; holding it to be contrary to the rules of a court of chancery for the plaintiff to set up new matter necessary to his case by way of replication; that omissions in a bill cannot be supplied by averments in the replication; and that a plaintiff cannot be allowed to make out a new case in his replication. This is equally true whether it is an answer or plea that is replied to. See Daniell, Ch. Pl. & Pr. (4th Ed.) 828, note 1. "Matters in avoidance of a plea, which have arisen since the suit began, are properly set up by a supplemental bill, not by a special replication;" citing *Chouteau v. Rice*, 1 Minn. 106. In Mitford & Tyler, Pl. & Pr. in Eq. 412, 413, we find, "special replications, with all their consequences, are now out of use, and the plaintiff is to be relieved according to the form of the bill, whatever new matters have been introduced by the defendant's *plea* or *answer*." The replications to the plea and demurrer cannot be sustained.

The second motion of the defendants, that the bill of revivor be dismissed, is based upon equity rule 38, which provides that if the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

It appears in this case that the bill of revivor was filed August 14,

1880; the plea and demurrer, September 6, 1880; the replications, July 30, 1881; and that soon after (August 4th) the plaintiffs' counsel asked the court to fix a day for the argument. It further appears that after the filing of the plea and demurrer, September 6, 1880, a stipulation was entered into by counsel upon both sides extending the time for hearing to the November rule-day, 1880, meantime the complainants to be allowed to file proper pleadings in reply to said plea and demurrer. By further written agreements between counsel the postponement provided for by this stipulation was extended monthly until February, 1881. Then we find a further stipulation as follows:

"It is hereby agreed that no movement on either side shall be made in this cause until May, 1881, without prejudice to complainants' right to file evidence of appointment as administrators in Boston."

By the affidavit of Mr. Payne, one of complainants' counsel, it appears that in October or November, 1880, Mr. Lothrop, one of defendants' counsel, stated, in effect, that while he would sign the stipulation, the complainants' counsel might take their own time about bringing the case to a hearing.

In the light of all these circumstances it is fair to presume that complainants' counsel understood that any rigid enforcement of the rule now invoked had been waived, impliedly by acts and conduct, if not in express terms; and we are of this opinion.

Considering the repeated postponements which had taken place, for the mutual accommodation of both sides, so far as appears, the language used by defendants' counsel as to time of hearing; and bearing also in mind that the replications were filed within three months after May, 1881; and that within a week thereafter the plaintiffs moved the court to set a time for hearing,—it would, we think, be inequitable to allow the defendants' motion to dismiss to prevail. Indirectly, as bearing on this question of laches, reference is made to the fact that the original bill in this case was brought in 1871, the answer filed in 1873, the replication not put in until 1875; also, that the original complainant died in 1876, and that the bill of revivor was not brought until 1880. In answer to this charge, the complainants say that the delay has been owing to the pendency of another suit in the state court of Rhode Island, the determination of which might affect the prosecution of this suit, and that, consequently, the delay was acquiesced in by both sides. They further state that within a short time after the final decision by the Rhode

Island state court the bill of revivor was filed, and that they are now anxious to speed the cause. Under these circumstances, and in the absence of any motion on the part of the defendants to speed the cause, we do not see how the charge of laches can be seriously pressed; at least, so far as the present motion is concerned.

The complainants, in the event of their replications being held to be bad, ask leave to withdraw them, and to amend their bill of revivor by inserting, among other things, the fact that they were on the twenty-fifth day of July, 1881, by the court of probate for the district of Suffolk, in the state of Massachusetts, duly appointed administrators of the estate of Earl P. Mason. The defendants object, upon the ground that this is new matter, accruing since the filing of the bill, which cannot be set up by amendment, but only by supplemental bill. It is true that events which have happened since the filing of a bill cannot be introduced by way of amendment, and that as a general rule they may be set out by supplemental bill. Equity Rule 57, U. S. Court.

In Daniell, Ch. Pl. & Pr. (4th Ed.) 1515, note 1, we find "an original bill cannot be amended by incorporating anything therein which arose subsequently to the commencement of the suit. This should be stated in a supplemental bill." And again, on page 828, note 1, (already cited,) it is laid down that matters in avoidance of a plea, which have arisen since the suit began, are properly set out by a supplemental bill. Mitford & Tyler, Pl. & Pr. in Eq. 159; Story Eq. Pl. § 880. But in this case it is difficult to see how a supplemental bill can be brought. The bill of revivor has not become defective from any event happening after it was filed. But originally, when it was brought, it was wholly defective; for the fact that the plaintiffs were appointed administrators by the proper court in Massachusetts was necessary to its maintenance. *Mellus v. Thompson*, 1 Clif. 125. And yet this event happened, as the record discloses, nearly a year after it was brought. If the bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill, founded upon matters which have subsequently taken place. *Candler v. Pettit*, 1 Paige, Ch. 168.

In *Pinch v. Anthony*, 10 Allen, 471, 477, the court observe:

"We have found no authority that goes so far as to authorize a party, who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued

after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill." Daniell, Ch. Pl. & Pr. (4th Ed.) 1515, note.

We are of the opinion that this new matter cannot be incorporated in the bill of revivor by amendment, nor introduced in a supplemental bill, and that the proper course for the complainants to pursue is to bring a new bill of revivor.

(1) The defendants' motion to strike from the files complainants' replications to plea and demurrer is granted. (2) The defendants' motion to dismiss bill of revivor is denied. (3) The complainants' motion to amend bill of revivor is denied.

RUTZ v. CITY OF ST. LOUIS.*

(Circuit Court, E. D. Missouri. February 13, 1882.)

1. RIPARIAN RIGHTS—DIKES—DAMAGES.

Where a city, by authority of an act of the legislature of the state in which it is situated, builds a dike extending into a navigable river, owners of land on the opposite shore and in another state, who suffer no loss in consequence of the erection of the dike, cannot maintain actions against the city for damages.

Action for damages alleged to have been sustained in consequence of the defendant building a dike extending into the Mississippi river.

Upon the trial of this case, without the intervention of a jury, the court finds the facts to be:

That prior to 1874, and for several preceding years, the current of the Mississippi river was constantly eroding the east river bank, owned by the plaintiff. Between that bank and the Missouri shore was an island, known as Arsenal island, the main channel of the river in 1874 being between said island and the Missouri shore, and immediately along the latter. Under an act of the Missouri legislature, and pursuant to an ordinance of the defendant city under said act, with the view of improving the harbor of said city, a dike was built by it in 1874 known as the Bryan-street dike, extending into the Mississippi river and the main channel thereof 700 feet towards said island from the Missouri shore. The distance from the Missouri shore to the island, the head of which was above the dike, was 2,400 feet. Several witnesses were of opinion that the tendency of said dike was to deflect the current of the river to the east of the island and erode the bank owned by plaintiffs, which, as the evidence showed, had been washed away to the extent of 37 acres or more, valued at \$300 per acre. Other

*Reported by B. F. Rex, Esq., of the St. Louis bar.

witnesses testified that the main channel and current of the river, after the building of the dike, continued actually to flow along the Missouri shore, hugging the end of the dike, and was not deflected to the east of said island; nor was there any increased volume of water caused by said dike flowing along the Illinois shore. The dike in question has been since removed, at the instance of United States engineers, and a new dike built by the United States, connecting said island with the Illinois shore above plaintiff's land, and closing the "chute" there for all navigable purposes. The necessary effect of the United States dike is to fill up the east "chute," so that large accretions will follow. In the light of the testimony the court finds that plaintiffs' land was not washed away in consequence of the dike built by defendant. The court declares the law to be that under the foregoing facts the plaintiffs are not entitled to recover. This ruling is based on the fact that the dike built by the defendant did not damage the plaintiffs. If it had done so, then the plaintiffs would have been entitled to recover to the extent of the injury sustained. Judgment for defendant.

Thomas C. Fletcher, for plaintiffs.

Leverett Bell, for defendant.

TREAT, D. J. Many propositions have been submitted to the court which are of large moment connected with the navigation and improvement of the Mississippi river. Time does not permit a detailed review of the many authorities on the subject. To enter upon that field of inquiry would compel an exhaustive consideration of the many decisions of state courts bordering upon the Mississippi river, and of the United States supreme court with reference thereto. The eastern boundary line of Missouri, for certain purposes, is to the middle of the main channel of the river. In the absence of a federal statute the state of Missouri could authorize improvements on the Missouri shore to be executed by state, municipal, or other organizations; and the same legal right exists in the state of Illinois.

It is clear that no supposed authority by either state could justify the destruction or substantial impairment of the navigation of the river which is free and common to all the states. In the absence of federal legislation whatever a state permits is necessarily subordinate to the general easement or rights of navigation. It is a well known physical law that the frequent changes of the channel are dependent on transient conditions, so that safe navigation exacts, in the absence of artificial aids, constant observation of natural effects and changes. The channel may be one year in one direction, and in another year in a different direction. The one or the other alluvial shore may be alternately eroded. The contraction of the channel, artificially, causes a scouring, whereby, greater depth being obtained, the same volume of water passes in the contracted channel. If the flow of

water is extended over great width, bars and islands are formed, shifting constantly as freshets and low water occur. Thus Arsenal island, under the changing currents, has shifted downward during the last 50 years for two or three miles. As the head of the island is washed away the foot of the island is enlarged. So this island has been gradually traveling southward, until an effort is now being made under United States authority to give it permanence, for the benefit of both those on the Illinois and the Missouri shores.

At the time of the grievances complained of, many structures had been contrived on both shores, some under local and some under United States authority, the design of which was to control the current in such a way as to benefit the harbor of St. Louis on the one side, and be of equal advantage to the Illinois shore and its proprietors on the other side. The effect of these dikes on the Illinois side has been to add, by accretions, untold wealth to riparian owners there, although their previously precarious shore lines or landings disappeared. In the matter of dollars they have been enriched, and could not show that any damages were recoverable by what, lawfully done, had been of vast moneyed benefit to them.

In the case before the court it was proved that prior to the construction of the Bryan dike there was a constant erosion of plaintiffs' land from natural causes, more or less of the current passing along the bend of the river east of the island. Witnesses testified that the effect of the dike was to deflect from the Missouri side of the island to the Illinois side an increased volume of water, whereby the abrasion would be accelerated. On the other hand, those daily engaged in the navigation of the river swore as matters of fact that no such result occurred. It must be borne in mind that the Bryan dike was on the Missouri shore below the head of the island, and that the current of the river hugged the Missouri shore around the head of the dike, necessarily scouring the bed of the channel to give greater depth for the outflow of the water. If the dike had been above the head of the island, and had thus deflected the body of the water, or any considerable portion thereof, into the "chute" east of the island, the plaintiffs' theory would be tenable; but the dike was below the head of the island, and its natural effect would be to wash away the west side of the island and not the shore east of the island. However that may be, it is evident that the improvements undertaken and abandoned by the defendant, at the instance of Illinois proprietors and the United States authorities, did not damage the plaintiffs. And it is also clear that the subsequent improvements by the United

States authorities in constructing a dike across the "chute," while destroying a navigable front there, has tended to check erosion and give vast accretions to the benefit of the riparian owner.

It is admitted that no one has a right to benefit himself to the injury of another; and that when a riparian owner on one side of the river seeks by dikes, or otherwise, to secure an improvement of his property, he must do so without obstructing the navigability of the river, or destroying the property of the riparian owner on the opposite shore. The uncertainty of shore lines and of the shifting channels of the river, together with the formation of "tow-heads," sand-bars, and islands, are incidents to the possession of lands bordering on the river. Along the Missouri and Mississippi rivers, for hundreds of miles, these changes occur annually to a greater or less degree from natural causes. It might be difficult to determine in many cases whether "rip-rapping" or other protection by a riparian owner of his own property did not cause, in saving his own property, a deflection of the current whereby an erosion might occur elsewhere. Must it be contended that he cannot legally provide against the destruction of his own property; that he must suffer his acres to be swept away in order that some other person may profit from his loss? Such an inquiry, however, is not pertinent to this case. It must suffice that the dike built by the defendant was lawful, and did not damage plaintiffs.

Many authorities are cited which have more or less bearing on this case, notably: *Athee v. Packet Co.* 21 Wall. 389; *Boom Co. v. Patterson*, 98 U. S. 403; *Pennsylvania v. Wheeling Bridge Co.* 13 How. 518. See, also, *Moffit v. Brewer*, 1 Greene, (Iowa,) 348; *Hosher v. Railroad Co.* 60 Mo. 333; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Benson v. Morrow*, 61 Mo. 345; *Crosby v. Hanover*, 36 N. H. 404; *Transp. Co. v. Chicago*, 99 U. S. 635; *Lee v. Pembroke Iron Co.* 57 Me. 481; *Cogswell v. Essex Mill Co.* 6 Pick. 94; *Thacher v. Dartmouth, etc.*, 18 Pick. 501; *Comins v. Bradbury*, 1 Fairf. 447; *Crittenden v. Wilson*, 5 Cow. 165; *Rippe v. Railroad*, 28 Minn. 18; *Dutton v. Strong*, 1 Black, 23; *Yates v. Milwaukee*, 10 Wall. 497; *Pumpelly v. Green Bay Co.* 13 Wall. 166; *Ten Eyck v. Canal Co.* 18 N. Y. L. 200; *Avery v. Fox*, 1 Abb. (U. S.) 246; *Hatch v. Railroad*, 25 Vt. 49; *Rowe v. Granite Bridge Co.* 21 Pick. 344; *Railroad v. Stein*, 75 Ill. 45; *Meyer v. City of St. Louis*, 8 Mo. App. 266.

The last case cited lays down correct rules for the case then before that court; but the same are not applicable either to the law or facts now under consideration. Of course an improvement by a city

for public purposes, whereby private property is taken, must be accompanied with compensation, as under the law of eminent domain. If the defendant had actually destroyed, for its own benefit, plaintiffs' property, it would be bound to respond in damages. But its alleged improvements, however absurd for its own supposed benefit, did not injure plaintiffs' property, even temporarily. Indeed, what has since occurred demonstrates that the plaintiffs have suffered no damage from the action of the defendant, but that they may incidentally profit largely therefrom. Whether that be so or not, the fact remains that the dike did not cause plaintiffs' property to be washed away, and that what occurred in consequence thereof, under United States authority, may or may not be of benefit to them, but certainly gave them no cause of action against the defendant.

See *Rutz v. City of St. Louis*, 7 FED. REP. 438.

CUYKENDALL v. MILES.

(*Circuit Court, D. Massachusetts.* January 31, 1882.)

1. CORPORATIONS—STATUTORY LAW—LIABILITY OF CORPORATORS.

A statute is not penal which provides that all stockholders shall be liable to an amount equal to that of their stock until the whole of the capital stock fixed and limited by the company shall have been paid in, and a certificate thereof shall have been filed.

2. STATE COMITY—ENFORCEMENT OF LIABILITY.

The rule of state comity applies with full force to the enforcement of the liability of shareholders of corporations.

Action of Contract. The plaintiff sued as receiver of the Dodge & Stevenson Manufacturing Company, a corporation established under the general laws of New York, having its principal place of business at Auburn, in Cayuga county. The declaration averred that the whole amount of the capital stock fixed and limited by the company had never been paid in, and no certificate thereof had been made and recorded; that the company carried on business until August 31, 1874, when it was dissolved by resolutions, which are set out; that on June 15, 1876, the plaintiff was duly appointed receiver of the company by an order passed by the supreme court of the state of New York; that the property and assets of the company were insufficient to pay its just debts due within one year from the time they were contracted, and which came due within one year after the dis-

solution; that on the twenty-first of July, 1876, the said supreme court duly passed an order directing the plaintiff to make and collect an assessment upon the stockholders of the company to the amount of 75 per cent. of the amount of stock held by them respectively; that he made such assessment; that the defendant at and before the dissolution held stock to the amount of \$4,000; that the debts for which the assessment was laid were contracted while he was a stockholder; and that the assessment upon him was \$3,000, which he had not paid, though requested. The defendant demurred.

F. P. Goulding, for defendant.

I. D. Van Duzee, for plaintiff.

LOWELL, C. J. The assessment sought to be recovered in this action was made under the general law of New York governing manufacturing corporations, as modified in relation to those established in Herkimer and Cayuga counties by later laws. These statutes are construed and passed upon in *Walker v. Crain*, 17 Barb. 119; *Story v. Furman*, 25 N. Y. 214; *Hurd v. Tallman*, 60 Barb. 272; *Cuykendall v. Douglass*, 19 Hun. 577; *Re Dodge & Stevenson Manuf'g Co.* 77 N. Y. 101. The last two of these decisions relate to this assessment and maintain its validity. The allegations of the declaration are sufficient to bring the defendant within the class of persons subject to assessment, until he shall show something to the contrary. Supposing this to be so, will an action lie in this court to recover the defendant's share of the assessment?

That the receiver of an insolvent corporation, having powers like those of an assignee in insolvency, may sue in his own name in this court, I cannot doubt. *Hurd v. Elizabeth*, 41 N. J. (12 Vroom.) 1; *Ex parte Norwood*, 3 Biss. 504; *Hunt v. Jackson*, 5 Blatchf. 349. These are direct decisions. The cases in which such actions have been maintained without objection, and others, in which the most eminent judges, while asserting the superior title of domestic attaching creditors, have said that the action itself was maintainable, are very numerous. *Goodwin v. Jones*, 3 Mass. 517, per *Parsons*, C. J.; *May v. Breed*, 7 Cush. 15, 42, per *Shaw*, C. J.; *Dunlap v. Rogers*, 47 N. H. 281, 287, per *Sargent*, J.; *Hoyt v. Thompson*, 5 N. Y. 320, per *Ruggles*, C. J.; S. C. 19 N. Y. 207, 226, per *Comstock*, J.; *Merrick's Estate*, 2 Ashm. 435, *Musselman's Estate*, 5 Watts & S. 9; *Mann v. Cooke*, 20 Conn. 178.

As the rule of the common law concerning the assignment of ordinary non-negotiable debts still obtains in Massachusetts, the receiver might be required to sue on such causes of action in the name of the

corporation. *Blane v. Drummond*, 1 Brock. 62; *Bird v. Pierpoint*, 1 Johns. 118; *Jeffrey v. McTaggart*, 6 M. & S. 126. But this demand is one which accrued to the receiver himself in his official capacity.

The supreme court hold that the mode in which a liability of this sort is to be enforced depends entirely upon the particular law governing the corporation. If that law merely provides for a proportionate liability of all stockholders for all debts, there should be a bill in equity for the benefit of all the creditors and against all the stockholders. *Pollard v. Bailey*, 20 Wall. 520; *Terry v. Tubman*, 92 U. S. 156; *Terry v. Little*, 101 U. S. 216. But if the law of the state authorizes an action by one creditor against one stockholder, that remedy may be pursued. *Mills v. Scott*, 99 U. S. 25. The decisions in New York, above cited, show that such actions will lie in the courts of that state by the receiver against the several shareholders.

Then, the question is whether such an action can be maintained outside the state of New York. There is a *dictum* of Mr. Justice Clifford that all such statutes are penal, and can only be enforced in the state which passed them. *Steam-engine Co. v. Hubbard*, 101 U. S. 188, 192. I agree with the plaintiff's argument that the authorities which the learned judge cites decide that point only in respect to officers of corporations made liable for a neglect of duty. *Halsey v. McLean*, 12 Allen, 438; *Derrickson v. Smith*, 27 N. J. L. 166; *Sturges v. Burton*, 8 Ohio St. 215, etc. Even in such cases the doctrine seems narrow and provincial. If a citizen of Massachusetts assumes the obligations of an officer in a corporation in New York, I see no sound reason for making the courts of Massachusetts a house of refuge from these responsibilities. Still, a law which imposes certain duties upon an officer, and makes him responsible, in case of neglect, for all the debts of a company, without regard to the nature of the default or the amount of the debts, or whether he is a shareholder or is paid for his services, has something penal about it. It was held in one case, and in only one, so far as I know, that where stockholders were made liable to all the debts, if the directors failed to file an annual statement of the company's affairs, the statute was penal, and to be narrowly construed. It was a domestic controversy, and not precisely in point here. *Cable v. McCune*, 26 Mo. 371. I have found no case, and counsel have found none, which holds that a liability of shareholders, as such, is penal. The courts of New York have always held such statutes to be remedial, and so have the courts of the other states, so far as I am informed. Thomp-

son, Stockholders, §§ 80-86; *Corning v. McCullough*, 1 N. Y. 47; *Carver v. Braintree Manuf'g Co.* 2 Story, 432. See *Crease v. Babcock*, 10 Metc. 557.

In the cases cited by the defendant (*Erickson v. Nesmith*, 15 Gray, 221; 4 Allen, 233; 46 N. H. 371) the courts of Massachusetts refused to sustain an action at law or a bill in equity against one stockholder of a New Hampshire corporation, and the courts of New Hampshire approved the decision; but the ground was, not that the statute of New Hampshire was penal, but that it provided a specific remedy in behalf of all creditors against all shareholders, and that this remedy could not be conveniently pursued excepting in the domestic forum. According to the reasoning of those cases, this action may be maintained, for the laws of New York, as we have seen, permit a similar action to be brought.

No one can contend that the assessment of national bank shares may not be enforced wherever shareholders are found. *Casey v. Galli*, 94 U. S. 672. The technical reason is that the act of congress operates throughout the country, while the laws of New York are local. But what reason is there, upon principle, why the courts should refuse to enforce the same remedy against the same person for the same liability when the charter happens to be a state charter which has not been turned into a national charter, as it may be at any time by a resolution of the shareholders?

The decisions which bear directly upon the point in controversy are few. I have found none that deny the exercise of comity on the ground that such a statute is penal, or, indeed, upon any other. On the contrary, such actions were sustained in the following cases: *Bond v. Appleton*, 8 Mass. 472; *Paine v. Stewart*, 33 Conn. 516; *Casey v. Galli*, 94 U. S. 672; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225; *Ex parte Van Riper*, 20 Wend. 614; *Turnbull v. Payson*, 95 U. S. 418. In the last case the defendant had not paid up his original subscription in full, but the assessment was under a statute which made him liable beyond his capital stock, and does not appear to have been sustained specially on the first ground.

The statute relied on by the plaintiff provides that all stockholders shall be liable to an amount equal to that of their stock, until the whole of the capital stock fixed and limited by the company shall have been paid in and a certificate thereof shall have been filed. In so far as the law makes shareholders responsible for a neglect of officers to file a certificate, it resembles the case in 26 Mo., above cited; but it differs in the very important circumstances that the lia-

bility is restricted to the amount of stock held by each person, and that the subject-matter is the payment of the capital. This statute should be considered not as penal, but as requiring (as all such laws do and must) the utmost care and good faith in contributing the capital, and as prescribing a certain sort of evidence of the fact, without which the shareholder shall be presumed not to have paid. It does not appear in this case whether the actual default was in the shareholders who had not paid their capital or in the officers who had not certified the payment. If it be the former, no one doubts that the defendant is liable with or without a statute. Even if it be the latter,—which on demurrer I cannot assume to be true,—still it is well known that officers of corporations do neglect the certificate with the knowledge of the shareholders, in order to give the company better credit, and thereby to obtain money and goods at better prices.

I do not feel inclined to extend what I consider the illiberal and narrow rule of comity, or want of it, which stops all remedies at the line of the state. The venerable maxim that he who shares the benefit should share the burden is just, and should not be local in its operation. It applies with full force to shareholders, if not to officers of a corporation who may not even be shareholders, and may act without pay. The cases, as far as they go, point in the same direction.

I ought to notice one further objection, that the assessment appears to have been *ex parte*; or, at least, that there is no allegation that the defendant had a day in court. If this assessment were to have the effect of a judgment against the defendant there would be great force in this objection, though possibly not controlling force. But I understand that all defences specially applicable to this defendant, such as that he was not a stockholder, etc., are still open to him, and, indeed, perhaps the whole subject may be open. Enough is alleged in the declaration to put him to his defence.

Demurrer overruled.

GAUCHE and another, Syndies, v. LONDON & LANCASHIRE INS. Co.*

(Circuit Court, E. D. Louisiana. December 19, 1881.)

1. INSURANCE—PRELIMINARY PROOFS—ARBITRATION.

The conditions in a policy of insurance requiring preliminary proofs, and a reference to arbitration in case of difference, are conditions precedent to suit upon the policy.

2. SAME—DELAY FOR PAYMENT AFTER PRELIMINARY PROOFS.

The clause providing that "payment of any loss or damage shall be made within 60 days after satisfactory proof thereof shall have been made to the company," means that suit cannot be maintained until 60 days after delivery of preliminary proofs, which are or should be accepted as satisfactory; and a suit commenced before the expiration of said 60 days is premature, and the commencement of a suit is the issuance of process, not its service upon defendant.

3. SAME—EXAMINATION OF INSURED.

An examination of the insured under oath is consistent with a demand for proper preliminary proofs.

4. SAME—WAIVER OF DEFECTS IN PRELIMINARY PROOFS.

The insurer who rejects as defective preliminary proofs without specifying the defects, but refers the insured to the condition of the policy which defines what they must contain, with a notice that he insists upon an exact compliance with that condition, waives no right to urge the defects in such proofs.

5. SAME—SAME.

The policy requiring the insured to furnish as particular an account as the nature of the case will admit of, will not be complied with by a statement in which there is not even an attempt made to enumerate the articles lost, or to give their kind or value; and a reference to the books and invoices of the insured, even when they had been in the possession of the insurer after the loss, will not be sufficient, as it is the duty of the insured to make out the particular statement.

6. SAME—ARBITRATION CLAUSE.

The arbitration clause, which requires the award of arbitrators as to the amount of damages, is a valid contract, and a compliance or attempted compliance with it is a condition precedent to suit.

7. SAME—SUFFICIENCY OF PRELIMINARY PROOFS.

The sufficiency of preliminary proofs, there being no question of waiver involved, is a question of law for the court, and not a question of fact for the jury.

Joseph P. Hornor, Francis W. Baker, George H. Braughn, Charles F. Buck, Max Dinkelspiel, L. L. Levy, and Benjamin C. Elliott, for plaintiffs.

John A. Campbell, Edward W. Huntington, Francis T. Nicholls, Charles Carroll, and Charles E. Schmidt, for defendants.

BILLINGS, D. J. This is an action upon a policy of insurance against loss by fire. The defendant pleaded special pleas, or, as

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

under our Code of Practice they would be termed, dilatory exceptions, along with the plea to the merits. These pleas are to the effect that the conditions precedent established by the policy have not been performed: (1) In that no proper preliminary proofs were furnished; and (2) that there had been no arbitration whereby the "amount of loss" must be determined, and that until these conditions have been performed no right of action in the plaintiff exists. The court ruled that the plaintiffs, having alleged performance by furnishing preliminary proofs, were confined to evidence in support of that allegation, unless they elected to amend and plead a waiver of that obligation; and the plaintiffs elected to stand upon the allegation that preliminary proofs were furnished. Under rule 3 of this court these special or dilatory pleas were first tried, and when the evidence on the part of the plaintiffs was finished, defendants' counsel asked the court to exclude the testimony from the consideration of the jury as being insufficient to show the delivery of preliminary proofs or any arbitration and award. The policy of insurance offered in evidence by the plaintiffs contains certain provisions which are declared therein to be conditions with reference to the preliminary proofs, and with reference to arbitration. These provisions are held to be conditions precedent by an unbroken line of authorities. Unless they are against the policy of the law, or have been waived, they must be proved to have been performed as stipulated, for they are the law of the case established by the parties themselves.

1. First, as to the preliminary proofs. The stipulations on this subject are as follows:

No. 8. "All persons insured by this company, sustaining any loss or damage by fire, shall immediately give notice to the company or their agents, and within 14 days after such loss or damage has occurred shall deliver in as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and by their books of account, or such other proper evidence as the directors of this company or their agents may reasonably require; and until such declaration or affirmation, account and evidence be produced, the amount of such loss, or any part thereof, shall not be payable or recoverable."

And—

No. 10. "Payment of any loss or damage shall be made within 60 days after satisfactory proof thereof shall have been made to the company in accordance with the conditions of this policy, and in every case of loss the company will reserve to itself the right of reinstatement, in preference to the payment of claims, if it shall judge the former course to be most expedient."

These provisions are cumulative, and are to be construed together. Their meaning is that the assured's right of action shall not be exercised until there has taken place both the delivery of satisfactory proofs and the passage of 60 days thereafter. The assured, therefore, can in no case maintain an action until 60 days after he has rendered preliminary proofs, which either are *to be deemed* satisfactory because they are accepted by the insurers, or *are* satisfactory, whether accepted or rejected by the insurers, because they perform the promise contained in the contract.

The fire and loss occurred on January 1st.

Four papers, or sets of papers, were furnished to the defendants on behalf of the insured, as preliminary proofs, as follows: The first within a week after the fire; the second on January 24th; the third on February 11th; and the fourth on February 28th.

In response to the first proffer an oral statement was made that it was unsatisfactory. To the second a reply was given in writing that the papers were insufficient, and they added: "We notify you for your guidance that only such papers as comply in every respect with section No. 10 of the printed conditions of our policy can be accepted by us as proper proofs of said loss." To the third set of papers a written reply was given, returning them and repeating the substance of the second reply, but more fully expressed. To the fourth the written reply was given as follows: "We return the enclosed papers, purporting to be proofs of loss, which are incomplete and unsatisfactory."

It was proved that the insured were, during the time occupied by their successive offers of proofs, examined under oath at the instance of the defendants; that the following paper was executed by the insured on the one part, and by those who represented the defendants and the other insurers on the other part:

State of Louisiana, Parish of Orleans: This agreement, made on the thirteenth day of January, 1881, between Messrs. Isidore Levy & Co., of the first part, and the several insurance companies interested in their loss by fire January 1, 1881, of the second part, mutually agree that the merchandise saved from the front store, No. 24 Magazine street, has the present value of \$1,000; the condition of the stock being in such a condition that it is impossible to determine the first cost of the same.

[Signed]

ISIDORE LEVY & CO.,

By Isidore Levy.

J. W. COVINGTON,

C. N. WELCHANS,

Committee for insurance company at interest.

—And that the damaged goods were subsequently taken by the insured. The examination of the insured was entirely consistent with the demand for proper preliminary proofs. See *Columbian Ins. Co. v. Lawrence*, 2 Pet. 53. The court there say:

“Did the examination of the title, and the proceedings of the board respecting it, presuppose an examination of the preliminary proofs and an acquiescence in its sufficiency? We think not. The proof of interest, and the certificate which was to precede payment if the claim should be admitted, are distinct parts of the case to be made out by the assured. Neither of those parts depends on the other. The one or the other may be first considered without violating propriety or convenience. The consideration of the one does not imply a previous consideration and approval of the other. The language of the ninth rule does not imply that the proof it requires is first in order for consideration. After stating what shall be done by the assured, the rule requires the affidavit and certificate in question, and adds that until such affidavit and certificate are produced, the loss claimed shall not be payable. The affidavit and certificate must precede the payment, but need not precede the consideration of the claim.”

The agreement that the value of the damaged and saved goods should be fixed at \$1,000, had no tendency—no direction—towards waiver. In fact, it rendered a full enumeration of the lost articles all the more necessary, as in case the defendants had elected to reinstate the plaintiffs would have been debtors to them in that sum.

It was also urged by counsel for plaintiffs that so complete had been the proofs that the general objection of the defendants worked a waiver as being utterly groundless. I cannot assent to that reasoning. If one party to a contract insists it has not been performed, even if he be perverse and altogether unsupported by reason or law, the answer to his demand for performance could never be that by unreasonable exaction he had waived any right, but he could be answered only by showing complete performance of the contract. It is not contended that there was any express waiver, nor has there been any evidence introduced tending to show an implied waiver. The doctrine upon which waivers of this clause have been implied is that of good faith, that neither by silence, nor by putting the refusal to pay upon grounds which seemingly admit or dispense with preliminary proofs shall the insurer mislead the assured into a belief that his proofs are proper, and afterwards be allowed to absolve himself from liability by showing defects in those proofs. This doctrine is not only the doctrine of the law: it is that of morals and of integrity. But it has no application to a case where, as here, from first to last, the insurer gave notice to the assured that with respect to proofs the

terms of the stipulation must be exactly complied with. It can never be held that denial, even if it were excessive, amounts to affirmation. There is no evidence on this subject except that of constant, uniform, unwavering demand on the part of the defendants of an unrelaxed performance of this part of the contract. The law on this point is laid down with explicitness in *Kimball v. Hamilton Fire Ins. Co.* 8 Bosw. 503. The court there say:

"Silence when they (preliminary proofs) are furnished, especially if accompanied with the plain assertion of a distinct ground of defence, or a general denial of their liability, will ordinarily amount to a waiver. And we see that the reason of this is the tendency to mislead the claimants. But I have not found a case—I doubt if any is to be found—holding that the assurer who appraises the assured that his papers are no proofs, and refers him to the policy, is bound to go further and specify the particular defects. No case has decided that if he appraises the insured that he will rely on the defect of proofs he waives this objection by taking others which he insists will defeat the recovery."

In *Lycoming County Ins. Co v. Updegraff*, 40 Pa. 324, the court say:

"They (the insured) were given to understand that a particular statement was necessary. How it can be claimed they were released from the obligation to furnish it, we cannot discover."

The question then is, did the plaintiffs furnish the proofs called for by the terms of the policy?

The fourth set of documents could not be a basis for this suit. They were furnished not earlier than February 28th. This suit was instituted on April 25th. Sixty days must elapse, and there had elapsed only 56. It is urged that though the petition was filed on April 25th, citation was not served till the thirtieth of that month. So far as interruption of prescription is concerned the time dates from service of petition, because it is in that case treated by the statute as a question of time of notice to the defendant. But when, as here, the court is called upon to enforce an agreement of the parties that suit shall not be brought, the commencement of the suit is the issuance of the writ, (here the citation,) and the pleas and judgment have relation to that time alone. See Bouv. Law Dict. *verbis*, Commencement of Suit," and the authorities there cited.

The fourth set of papers, therefore, need not be considered. The question here is, then: Were either of the first three papers or sets of papers, or all together, sufficient preliminary proof of loss within the meaning of the terms of the stipulations of this policy? The

insurance is "on stock consisting of china, glass, wood and willow ware, and general house-furnishing goods." The statement is to be as particular an account of their loss or damage as the nature of the case will admit of, and the company in every case reserves the right of the reinstatement, *i. e.*, of the substitution, of new articles in place of those destroyed.

The first paper, that of January 24th, is without affidavit or even signature, and consists of a reference to the books of the assured under the items of stock as per inventory, various "invoices, sundries, cash, and suspense," with an added total of \$95,928, from which are deducted total sales, profits, amount duties paid, the amount of 10 invoices and traveling expense charged to merchandise, making in all the sum of deductions to be \$39,778.19, leaving a balance of \$56,149.82.

The second and third papers add nothing to the statement by way of particularity. The addition being an affidavit, a statement that all the books of the insured were in possession of defendants for two weeks after the fire, and the statement that some \$4,600 worth of goods were in other warehouses and insured by the La Confiance Insurance Company, and concludes the Statement B, "annexed to our proof of loss (the first paper as above designated) contains a complete list of our stocks taken from our books, and is true and correct." And the second paper, that of the twenty-fourth of January, says the "insured claim as follows: On stock consisting of china, glass, wood, and willow ware, and general house-furnishing goods, contained in three-story brick slated building aforesaid."

The question, then, is not whether the insured are exempted by destruction of sources of information from compliance with the stipulation to furnish a particular statement, but whether this is in itself a particular statement of the loss or damage to a company who are by the terms of the policy to have 60 days to reinstate, and by insured parties who have offered no evidence tending to show that they did not have unimpaired all of the appliances of wholesale dealers—such as books, invoices, and letters, from which to make a proper statement. It is to be observed that the statement never approaches detail, does not deal in a single particular as to kind or enumeration, and if it gives even the slightest notion of value, does it only by reference to the books and invoices in their own possession. The question is directed in this case to this statement free from all extrinsic matters, and the court is called upon to say whether this is a particular statement. I feel bound to say that it is in no sense a particular

statement. It has not one element of such a statement. A particular statement should give accurately, if possible, or, if not possible, approximately, the *kind and value* of the articles lost. *Catlin v. Springfield Ins. Co.* 1 Sumn. 437.

It should also be at least an effort to enumerate. It should be in its aim of such a circumstantial character as to afford detailed, itemized information of the extent of the loss. All this is wanting. It gives the stock on hand in May, adds the invoices in gross, deducts the sales and profits, and presents the result in bulk, so to speak, as the sole means of arriving at the loss. It gives no weight, no measurement, no reckoning, no description, however general. This is no *particular account*. It is rather *an estimate without particulars*. Instead of enabling verification it would defy it. Instead of furnishing opportunity to substitute, it gives not even the most vague description. Precisely this manner of statement was condemned as being not a particular account, first by the common pleas court by the court, and, on appeal, by the supreme court, in *Lycoming Ins. Co. v. Updegraff*, 40 Pa. St. 311. The court there said, (p. 323:) "We agree with the learned judge of the common pleas, that the paper which was furnished was not such a particular account of the loss as was required by the policy." The case is not varied by the fact that the insurers had had possession of the books containing the inventory and invoices to which reference was made. It was, nevertheless, the duty of the assured to carry on the process of searching for and finding the elements of a particular account in their own books, and they could not thus cast it upon the insurers. I do not mean to say that accounts no more particular than this have not been accepted by courts as sufficient, but it has been where the acts of the underwriters constituted a waiver, or where the fire which occasioned the loss also destroyed all means of identifying and describing the things destroyed. But where, as here, there is an absence of all evidence of estoppel on the part of the defendants, and of inability on the part of the insured, I know of no case which holds such a statement as was presented in this case to be a compliance with the stipulation to furnish a "particular account."

2. Is the question here presented one for the court or the jury? The answer depends upon whether the question be one of law or fact. If there had been evidence tending to show waiver of preliminary proofs, that would have been for the jury. If there had been evidence tending to show destruction of books, so that there could be no com-

pliance with the stipulation requiring proofs, that would have been for the jury. In all the cases where courts have held that the sufficiency of preliminary proofs must go to the jury there has been either the question of defective ones having been rendered sufficient ones because of waiver, or because of destruction of books or other inability to furnish proper proofs from some cause beyond the control of the assured. In those cases the question reaches out to matters extrinsic to the papers themselves, claimed as constituting proofs, and the question of sufficiency is for the jury. But this case finds neither evidence tending to establish waiver, nor destruction of books nor other cause of inability. It presents simply the question whether, intrinsically judged, in and of themselves, the papers submitted constituted proofs. The decisions of the supreme court of the United States and of the supreme courts of the states have with well nigh unanimity defined with exactitude the principle which separates questions of law from questions of fact. The question which presents the closest analogy to the one before the court is, what constitutes due diligence in giving notice to an indorser of a promissory note of non-payment? and a long line of concurrent decisions has established the law as being that when the facts are undisputed what is due diligence is a question for the court. In the cases collated—1 *Brightly's Dig. verbo*, "Jury 7," (a.) No. 102, p. 511—it is also held that when the facts are admitted or established, the question as to what is a reasonable time for the production of preliminary proofs is for the court. *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507–513.

In the cases where, as here, nothing was before the court except the measurement of the papers proffered as preliminary proofs by the requirements of the contract—no extrinsic question—the court has uniformly determined as to the sufficiency of proofs. Justice Story did this in *Catlin v. Springfield Ins. Co.* 1 Sumn. 437; *Lycoming Ins. Co. v. Updegraff*, 4 Wright, (Pa.) 311; *Beatty v. Lycoming Ins. Co.* 66 Pa. St. 17; *Wellcome v. People's Equitable Fire Ins. Co.* 2 Gray, (Mass.) 480; *Norton v. Rensselaer & S. Ins. Co.* 7 Cow. 645; and *Kimball v. Hamilton Fire Ins. Co. supra*; 8 Bos. 503. As to the question whether the 60 days had elapsed since the service of the last set of papers, and before the institution of this suit, see ruling of Judge Duer. 7 Cow. 647. From an examination of the cases cited, and of all the cases I could consult, I am of the opinion that the question here presented is for the court to respond to, and the court declares that there had not been preliminary proofs furnished

according to the conditions of the policy sued on 60 days prior to the commencement of this suit.

3. The third special plea of the defendant is to the effect that it was a part of the contract of insurance, made a condition precedent to the right to maintain an action thereon, that in case of difference between the parties there should be an arbitration and award as to amount of loss or damage; that there was a difference; that there has been no arbitration or award; and avers willingness at all times on the part of defendants to submit the amount of loss or damage to arbitration.

The stipulations as to award are as follows:

(11) "If any difference shall arise with respect to the amount of any claim for loss or damage by fire, and no fraud suspected, such difference shall be submitted to arbitrators indifferently chosen, whose award, or that of the umpire, shall be conclusive."

And—

(14) "It is further hereby expressed, provided, and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided."

It has been urged that this stipulation is void as being against the policy of the law in that it withdraws the questions from the courts. I think the weight of authority is decidedly in favor of the conclusion that parties may legally by their own agreement refer the amount of damage under a contract to arbitrators, and by a proper covenant withdraw that one question from the courts. In *Scott v. Avery*, 5 H. of L. Cas. 811, this was decided in 1856, and that decision has been, so far as I can ascertain, acquiesced in both in Great Britain and in this country. The cases which seem to conflict with this case are those which were, or were thought to be, distinguishable from it. The doctrine there established has not been doubted. The cases to which I have been referred which were construed to be opposed to it are where there was no covenant not to sue until an award, but merely a covenant to refer. Those cases are in harmony with *Scott v. Avery*, as appears by the lucid statement of Baron Bramwell, in *Elliot v. Royal Exchange Assurance Co.* L. R. 2 Exch. (1866-1867) p. 245, and adopted by Lord Coleridge in *Dawson v. Fitzgerald*, 1 Law Rep. Ex. Div. (1875-1876) p. 260. That statement is as follows:

"If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum."

The cases where an action will not lie, and the case where an action will lie, are here precisely distinguished. It is the negative words contained in the fourteenth stipulation, that no suit or action for the recovery of any claim by virtue of this policy shall be sustainable until after an award, which place this case in the latter class of cases. That this plea is, in law, good, is well settled by authority. Under our system of pleading we have no written statement responsive to the pleas of defendants, except where they amount to a reconventional demand. But the plaintiffs may give in evidence any matter in disproof or avoidance of the pleas, as if the practice of the courts allowed a responsive pleading and he had pleaded the same. The production of the policy by the plaintiffs maintains the substance of this plea, *i. e.*, the covenant not to sue; the stipulation is contained therein as is averred. That being so, there could be but two facts which could have avoided this plea,—either that it had been waived by defendants, or that insured had offered to perform, *i. e.*, had offered to arbitrate, and a refusal on the part of defendants. The plaintiffs have introduced no evidence tending to establish any fact in avoidance of the condition or covenant which the contract they sue upon contains.

The court having announced its conclusion that there was no evidence to be submitted to the jury, the plaintiffs submitted to a nonsuit, which was accordingly entered.

PEOPLE OF THE STATE OF NEW YORK v. COMPAGNIE GENERALE TRANS-
ATLANTIQUE.*

(Circuit Court, S. D. New York. February 9, 1882.)

1. CONSTITUTIONAL LAW—STATE TAX ON ALIEN PASSENGERS.

The act of the legislature of the state of New York, passed May 31, 1881, and known as chapter 432, Laws 1881, which provides that a tax of one dollar be levied upon every alien passenger who shall come by vessel from a foreign port to the port of New York, and that out of said tax the commissioners of emigration of New York shall expend all such sums as may be necessary to enable them to execute the inspection laws of the state of New York, with the execution of which they are or may be charged, which inspection laws have reference to the examination of said passengers, and that any balance of said tax shall be paid into the treasury of the United States, is a regulation of commerce with foreign nations, and as such is unconstitutional and void.

2. SAME—SAME—INSPECTION LAWS.

Such act cannot be maintained under article 1, § 10, of the constitution of the United States, as a law laying a duty on imports to execute an inspection law. "Imports" and "inspection laws," within the meaning of that section, have reference solely to merchandise, and do not include persons.

Henderson v. The Mayor, 92 U. S. 259, cited and applied.

On Demurrer to Complaint.

Lewis Sanders and *George N. Sanders*, for plaintiffs.

Frederick J. Coudert, for defendant.

BLATCHFORD, C. J. This suit was commenced in the court of common pleas for the city and county of New York, and was removed into this court. The complaint was put in in the state court. It alleges that the defendant is and was, at the times thereafter mentioned, a corporation formed under the laws of France, and owner of the vessels thereafter named; that the defendant, by vessels from a foreign port, brought to the port of New York alien passengers, for whom a tax has not heretofore been paid by the vessels, on the dates, from the ports, and to the number stated in the complaint, being in June, July, and August, 1881, by nine vessels on sixteen voyages, all from Havre or Marseilles, the number of alien passengers being, in all, 6,214; that the master, owner, agent, and consignees of such vessels, each and all, failed and neglected to pay, or cause to be paid, to the chamberlain of the city of New York, within 24 hours after the arrival of each of said vessels at the port of New York, or at any time, the sum of one dollar for each and every one of said passengers so brought, as aforesaid, nor has any part

*Reported by S. Nelson White, Esq., of the New York bar.

thereof been paid; and that there is due to the plaintiffs from the defendant, by reason of the premises, the sum of \$7,767.50, debt and penalty, and interest thereon from the day after the entry of each vessel at the port of New York, for the tax and penalty imposed by law, respectively, for which sum, with interest, the plaintiffs demand judgment, with costs. The defendant has put in, in this court, a demurrer to the complaint, which states, as a ground of demurrer, that it does not state facts sufficient to constitute a cause of action. The parties, by their attorneys, have stipulated, in writing, that this action "is brought and prosecuted under and pursuant to an act of the legislature of the state of New York passed May 31, 1881, and known as chapter 432 of the Laws of 1881;" and that the demurrer is based upon the claim that the said act "is repugnant to various provisions of the constitution of the United States, (particularly article 1, § 8, and subdivision 2 of § 10,) and also, to the Revised Statutes of the United States, and also to the provisions of the treaties now existing between the United States and France, and other countries." The stipulation states that its intent is "to remove any question as to the right of the defendant to present and argue all such questions with the same force and effect as if the demurrer assigned various causes, separately setting up each and every objection that may be based upon the constitution of the United States or of the state of New York, or upon any existing treaties with foreign powers, or upon any alleged want of power on the part of the state to enact such a statute as that now sought to be enforced, or of the plaintiffs to bring and maintain this action."

The act of May 31, 1881, (Laws of New York, 1881, c. 432, p. 590,) is as follows:

"Section 1. There shall be levied and collected a duty of one dollar for each and every alien passenger who shall come by vessel from a foreign port to the port of New York for whom a tax has not heretofore been paid, the same to be paid to the chamberlain of the city of New York by the master, owner, agent, or consignee of every such vessel within 24 hours after the entry thereof into the port of New York.

"Sec. 2. It shall be the duty of the master or acting master of every such vessel, within 24 hours after its arrival at the port of New York, to report, under oath, to the mayor of the city of New York, the names, ages, sex, place of birth, and citizenship of each and every passenger on such vessel, and, in default of such report, every passenger shall be presumed to be an alien arriving at the port of New York for the first time. And in default of every such payment to the chamberlain of the city of New York there shall be levied and collected of the master, owner, agent, or consignee of every such vessel a penalty of 25 cents for each and every alien passenger.

Sec. 3. It shall be the duty of the chamberlain of the city of New York to pay over, from time to time, to the commissioners of emigration all such sums of money as may be necessary for the execution of the inspection laws of the state of New York, with the execution of which the commissioners of emigration now are or may hereafter be charged by law, and to take the vouchers of the commissioners of emigration for all such payments. And it shall be the duty of the said chamberlain to pay over annually, on the first of January in each year, to the treasury of the United States, the net produce of all duties collected and received by him under this act, after the payments to the commissioners of emigration aforesaid, and take the receipt of the secretary of the treasury therefor.

"Sec. 4. The commissioners of emigration shall institute suits in the name of the people of the state of New York for the collection of all moneys due, or which may grow due, under this act; the same to be paid, when collected, to the chamberlain of the city of New York, to be applied by him pursuant to the terms of this act.

"Sec. 5. Section 1 shall not apply to any passenger whose passage ticket was actually issued and paid for prior to the time this act takes effect; but every ticket shall be presumed to have been issued after this act takes effect, in the absence of evidence showing the contrary.

"Sec. 6. This act shall take effect immediately."

Three days prior to the passage of the said act, and on the twenty-eighth of May, 1881, (Laws of New York, 1881, c. 427, p. 585,) an act was passed as follows:

"Section 1. The commissioners of emigration are hereby empowered and directed to inspect the persons and effects of all persons arriving by vessel at the port of New York from any foreign country, as far as may be necessary to ascertain who among them are habitual criminals or paupers, lunatics, idiots, or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves, and subject to become a public charge, and whether their persons or effects are infected with any infectious or contagious disease, and whether their effects contain any criminal implements or contrivances.

"Sec. 2. On discovering any such objectionable persons or effects, the said the commissioners of emigration and its inspectors are further empowered to take such persons into their care or custody, and to detain or destroy such effects, if necessary for the public welfare, and keep such persons under proper treatment, and provide for their transportation and support as long as they may be a necessary public charge. The commissioners of emigration shall, in case of habitual criminals, and may in other cases, where necessary to prevent such persons from continuing a public charge, retransport such person or persons to the foreign port from which they came."

"Sec. 3. The commissioners of emigration are further empowered to board any incoming vessel from foreign ports arriving at the port of New York, by its agents and inspectors, who shall have such powers as may be necessary to the effectual execution of this act, and any person who shall resist them in the execution of their lawful functions shall be guilty of a mis-

demeanor, and may be arrested by the officer resisted, and, upon conviction, may be sentenced to a term not exceeding six months in the penitentiary, or to pay a fine of \$100, or both.

"Sec. 4. This act shall take effect immediately."

These provisions were enacted with an endeavor to avoid the grounds on which former legislation had been held void as repugnant to the constitution of the United States. The provisions of part 1, c. 4, tit. 4, of the Revised Statutes of New York, which authorized the recovery from the master of every vessel arriving in the port of New York from a foreign port of a sum of money for each passenger, and appropriated the money to the use of the marine hospital, were held void in the *Passenger Cases*, 7 How. 283, in January, 1849. After that various amendments of the law were made, which came before the supreme court in *Henderson v. The Mayor*, 92 U. S. 259, in 1875, and were held void. This legislation required a bond for each passenger landed by a vessel from a foreign port to indemnify the commissioners of emigration and every municipality in the state against any expense for the relief or support of the passenger for four years, but the owner or consignee of the vessel could commute for the bond, and be released from giving it by paying \$1.50 for each passenger within 24 hours after landing him. If the bond was not given, nor the sum paid within 24 hours, a penalty of \$500 for each passenger was incurred, which was made a lien on the vessel, collectible by attachment at the suit of the commissioners of emigration. The statute applied to every passenger, and not merely to every alien passenger. It applied to every passenger by a vessel from a foreign port, landed at the port of New York. The court held that the statute amounted to a requirement of the payment of the \$1.50; that it was, in its purpose and effect, a law imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries; that, in taxing every passenger, it taxed a citizen of France landing from an English vessel for the support of English paupers landing at the same time from the same vessel; that a law prescribing the terms on which vessels shall engage in transporting passengers from European ports to ports in the United States is a regulation of commerce with foreign nations; that congress alone could regulate such commerce; and that a state could not, under any power supposed to belong to it and called police power, enact such legislation as that under consideration. The court expressly reserved the question as to how far, in the absence of legislation by congress, a state could, by appropriate legislation, protect itself against actual

paupers, vagrants, criminals, and diseased persons arriving in its territory from foreign countries. A provision of the legislation of New York, then under consideration, concerned persons who should, on inspection, be found to belong to those classes, but the court acted on and held void that part of the statute which applied to all passengers alike, and that part alone.

The act of May 31, 1881, differs from the prior statute only in levying a duty of one dollar for each alien passenger, instead of \$1.50 for each passenger; and it may, perhaps, be limited to an alien who arrives for the first time. But it applies to such aliens who come as travelers for pleasure, and have means, and intend to go back, and to such aliens who come intending to remain, and have means, as well as to such aliens who are of the classes mentioned in section 1 of the act of May 28, 1881. It compels the owner of the vessel to pay one dollar for each of the alien passengers embraced in it for the privilege of landing him. The tax is expressly imposed for having the passenger come by the vessel from a foreign port to the port of New York. The new statute is as liable to the objection stated by the court in the *Henderson Case* as was the statute in that case.

But it is contended that the provisions of section 3 of the act of May 31, 1881, make the statute valid, as one laying an impost, or a duty on imports, for executing its inspection laws, under this provision of article 1, § 10, of the constitution of the United States:

"No state shall, without the consent of congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

The act of May 28, 1881, is the only so-called inspection law of the state of New York cited as one with the execution of which the commissioners of emigration are charged by law. The money received from the one-dollar tax for each alien passenger arriving for the first time is to be expended, as far as necessary, in executing the act of May 28th.

The question arises, therefore, whether the act of May 28th is an inspection law within the meaning of article 1, § 10. Inspection laws were known when the constitution was framed in 1787, and what were inspection laws was well understood. They had reference solely to merchandise. Their object was to improve the quality

of articles, and fit them for exportation or domestic use. *Gibbons v. Ogden*, 9 Wheat. 1, 203; 1 Kent, Comm. 439; Story, Const. § 1017.

In No. 44 of the *Federalist*, article 1, § 10 of the constitution is commented on, and it is said that the manner in which the restraint on the power of the states over imports and exports is there qualified—that is, in regard to inspection laws—“seems well calculated at once to secure to the states a reasonable discretion in providing for the convenience of their imports and exports, and to the United States a reasonable check against the abuse of their discretion.”

In Burrill's Law Dictionary “Inspection” is defined thus: “Official view or examination of commodities or manufactures, to ascertain their quality, under some statute requiring it.”

In Bouvier's Law Dictionary this is the definition: “The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce.”

In *Clintman v. Northrop*, 8 Cow. 45, the inspection laws of New York are said to be laws “to protect the community, so far as they apply to domestic sales, from fraud and impositions, and, in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.”

By the constitution of New York of 1846, art. 5, § 8, all offices for “inspecting any merchandise, produce, manufacture, or commodity whatever,” were abolished.

As the term “inspection laws,” in the section under consideration, refers only to laws for inspecting articles of merchandise, this shows that the terms “imports” and “exports,” in the same section, refer only to articles of merchandise. Persons are not imports or exports, or articles to be inspected, under the section. To pass a statute directing persons to be inspected to ascertain their condition as to character or pecuniary means, or physical characteristics, and then another statute calling the first one an inspection law, does not make it an inspection law. It was not and is not and can never be an inspection law, in the sense of the constitution. Nor can passengers arriving in the United States be imports or exports, in the sense of the constitution.

In *Brown v. State*, 12 Wheat. 419, 437, the section referred to was under consideration, and it was said by the court:

“What, then, is the meaning of the words ‘imposts, or duties on imports or exports?’ An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of

the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us they are 'things imported.' If we appeal to usage for the meaning of the word we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence, which limit the prohibition, show the extent in which it was understood. The limitation is, 'except what may be absolutely necessary for executing its inspection laws.' Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition."

These observations are persuasive to show that persons are not imports or exports, or the subjects of inspection laws, within section 10 of article 1. The word "imports" and the word "exports" must have equal extent and scope. The former can have no greater than the latter. The suggestion that persons departing from the United States by vessel could properly be said to be exported, or to be exports, under any circumstances, even when retransported by public authority, is not one which commends itself to the general understanding. If not exports they cannot be imports. The fact that the importation of persons is referred to in section 9 of article 1 has no effect to include persons within the word "imports," where that word is used. The clause referred to prevents congress from prohibiting prior to 1808 "the migration or importation of such persons" as any of the states then existing should think proper to admit. So far as this section referred to the involuntary arrival of persons, it had reference to persons brought in to become slaves and articles of merchandise.

There is nothing authoritative in the *Passenger Cases*, 7 How. 283, or in any other decision of the supreme court, which conflicts

with the foregoing views. The new statute of New York being void under the decision in the *Henderson Case*, no authority upholding it as a law laying a duty on imports to execute an inspection law can be derived from section 10 of article 1.

In *Railroad Co. v. Husen*, 95 U. S. 465, 472, the principle of the *Henderson Case* was affirmed and applied as a principle which forbids a state from burdening foreign commerce under the cover of exercising its police powers. It is such a burden to tax *all* alien passengers arriving by vessel for the first time, and the fact of examining or inspecting the persons of such passengers to see if they are good or bad, poor or rich, sane or lunatic, diseased or well, does not make the tax a tax to execute an inspection law.

Under this guise any law which required examination of any person or thing, and which used the word "inspection," could thereby be made an inspection law, and the restraint of the constitution could be frittered away, so long as the duties laid did not exceed what was necessary to execute the particular law. But there is, moreover, on the face of the act of May 28th, sufficient evidence that it can not be regarded as an inspection law. The acts of May 28th and May 31st cannot either of them derive any greater force from the fact that they are two acts, than the enactments in the two would have if they were all in one and the same act. The act of May 28th goes beyond the inspection and the ascertainment of the facts prescribed, and authorizes the commissioners to take the objectionable persons into their care or custody, and provide for the transportation and support of such persons "so long as they may be a necessary public charge." Some of the objectionable persons are defined to be "infirm or orphan persons, without means or capacity to support themselves, and subject to become a public charge." This is an eleemosynary system for supporting paupers, it may be for their lives. Able-bodied aliens arriving here for the first time, with means, in health, not among the classes called "objectionable" in the act, are to have a tax of one dollar laid for each of them to support such system. This is not an inspection law. It is a direct interference with the exclusive power of congress to regulate commerce with foreign nations.

It is urged for the plaintiffs that, inasmuch as section 10 of article 1 declares that the state inspection law shall be subject to the revision and control of congress, this court has no jurisdiction to revise or control the action of the state in exacting or administering the law. If the law is an inspection law, it is as such subject to the

revision and control of congress. But this fact cannot deprive the court of its power of adjudging, in a proper suit, whether the law is an inspection law at all, or whether it is a law of another character.

It results from the foregoing considerations that the demurrer is sustained, and judgment is ordered for the defendant, with costs.

OSGOOD v. ARTT.

(*District Court, N. D. Illinois.* January 17, 1882.)

1. STATUTES OF LIMITATION.

Where the laws of a state provide that "when a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state," the removal of a debtor into this state, after a residence in another state sufficiently long to avail himself of the bar of the statute of that state, will not revive the cause of action in this state.

Grant & Swift, for plaintiff.

Edsall & Hawley, for defendant.

BLODGETT, D. J. This is a suit upon a promissory note made by defendant, dated May 14, 1856, by which he agreed to pay the Racine & Mississippi Railroad Company, or order, \$2,500, with interest at the rate of 10 per cent. per annum, at the office of the company in the city of Racine, Wisconsin, in five years from date.

The fourth, seventh, and ninth pleas allege, in substance, under different forms of statement, that at the time of making the note, and until long after its maturity, defendant was a resident of the state of Illinois; that on the ninth of January, 1870, he removed from the state of Illinois to the state of Missouri, from which time he has continually resided in the latter state, and been at all times liable to a suit on said note in the courts of said state; that by the laws of the state of Missouri the plaintiff's right of action on this note is barred in 10 years from the time the cause of action accrued thereon; and that at the time the suit was commenced defendant had been for more than 10 years a resident in Missouri and liable to suit on said notes in such state; wherefore he insists that plaintiff's right of action is barred. The demurrers filed to the seventh and ninth pleas, and to the replications to the fourth plea, raise the single question whether the facts set up in these pleas are a good bar to this action under the limitation laws of this state.

Section 20 of chapter 83, Rev. St. Ill., tit. "Limitations," reads as follows:

"When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."

This section was first introduced into the limitation laws of this state in the act of April 4, 1872. Before that time the legislature had somewhat approached the principle embodied in this section by enacting in the act of April 13, 1849, that all actions founded on any promissory note executed, entered into, or accrued beyond the limits of this state, should be commenced within five years next after such cause of action should have accrued. And by the act of February 19, 1859, the words "cause of action accrued" were defined to mean the time when an action might have been commenced, "whether in this state or elsewhere." But, saving this exceptional legislation, the rule laid down in *Chenot v. Lefevre*, 3 Gil. 637, that the bar of the statute can arise only by a continuous residence within this state from the time the right of action accrued until the bar of the statute is complete, had been the settled law of this state up to the act of April 4, 1872; but by the section now under consideration the legislature evidently intended that when a debt had become barred by the operation of the laws of another state or country, the debtor, if sued in this state, could successfully plead such bar.

The plaintiff, however, insists that this case does not come within the scope of the twentieth section because the cause of action accrued upon the note in this state; that the defendant resided in this state when the note fell due, and the statute of this state had commenced to run; that the bar had not become complete when defendant removed to Missouri, and therefore the case comes within the operation of the last clause of the eighteenth section of chapter 83, which provides that "if after a cause of action accrues the debtor departs from and resides out of this state, the time of his absence is no part of the time limited for the commencement of the action." And plaintiff argues that as the defendant was once within the jurisdiction of this state, and the statute of this state began to run here, the defendant cannot by a removal to another state, where the time for barring the action is shorter than here, avail himself of the statute of such state as a defence here.

But it seems to me the two sections referred to must now be read

together, and the last clause of the eighteenth section, which is as old as the Revised Statutes of 1827, must, by the operation of the twentieth section, be held to mean that the time a defendant is absent from this state after the cause of action accrues, is no part of the time limited for the commencement of the action, unless the defendant resides in another state or country long enough to bar the action by the laws of such state or country.

In *Hyman v. McVeigh*, 10 Leg. News, 157, the supreme court of this state held that the words "when a cause of action has arisen," as used in this twentieth section, "should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin."

The pleas show that defendant removed into and became a resident of the state of Missouri after the note was due. The plaintiff had the right to sue at once in the courts of that state, and the cause of action, in the light of the authority just cited, arose in the state of Missouri as soon as defendant was subject to suit there. The statutes of that state bar an action on a contract like this in 10 years from the time the cause of action accrued in that state. *Wagner, St. of Mo. c. 89, art. 2, § 9.*

If, therefore, the plaintiff allowed his debtor to remain in Missouri without suit until the bar under the laws of that state became complete, then it seems to me that if the defendant returns into this state, either temporarily or to reside permanently, he comes back clothed under the provisions of section 20 of our statute with the protection he has obtained under the laws of Missouri. The plaintiffs were not residents of this state at the time defendant left and went to Missouri, and cannot be said to have been awaiting here the return of their debtor; and, for aught that appears, they could have brought suit in Missouri at any time while defendant was residing there.

In view of the increased facilities which have been developed within the last few years for communication between the states, and for bringing suits by non-residents, I think the legislature of this state meant to say that a creditor who allowed a debtor to reside in any state or country until his debt was barred by the laws of that state, should not have his right of action revived by the debtor removing into this state, even though he may have been once a resident of this

state and subject to suit here. I can see no reason of public policy or principle which shall withhold the protection of this statute to this defendant, and yet should give it to a debtor, who has contracted a debt in Missouri and remained there till an action is barred by lapse of time, and then removes or comes temporarily into this state. In the latter case, it was conceded on the argument, the statute is applicable, and I cannot conceive why it is not just as applicable when the debtor has removed from this state and remained in another until the laws of that state bar the action for lapse of time. The evident intention of the legislature of this state was to say that the removal of debtors into this state should not revive causes of action which had become barred by the laws of other states where they had resided and been subject to suit; that the debtor brought with him the defence he had obtained by his residence elsewhere; and if a debtor leaves this state and takes up his residence elsewhere, and remains there unmolested by suit until suit is barred, it is also barred here.

I much regret that this question has not been passed upon by the supreme court of this state; but, in the absence of any decision by our state courts on the question, I must go by such light as has been indirectly given by the case I have referred to, and what seems to me to have been the evident intention of the legislature.

The demurrer is overruled as to the pleas, and sustained as to the replications.

UNITED STATES v. EBBS.

(District Court, W. D. North Carolina. November Term, 1881.)

1. MARSHAL'S FEES — SERVICE OF A COMMISSIONER'S WARRANT IN A CRIMINAL CASE.

A marshal is not entitled to a fee for the service of a commissioner's warrant in a criminal case, where the deputy marshal, after arresting the accused, allows him to go free upon his promising to attend the commissioner's court on a certain designated day.

2. SAME—SAME.

Where a commissioner accepted an appearance bond in the absence of the accused, and before he had had a preliminary examination, and the marshal was advised of the fact, *held*, that a warrant in his hands is superseded; and that a subsequent arrest under the warrant is unauthorized, and does not entitle the marshal to charge a fee for the service of the warrant.

3. SAME—FOR ATTENDANCE AT THE HEARING AND GUARDING THE PRISONER.

Where the commissioner hears the case of a prisoner, and decides that he must give bail for his appearance in court to answer an indictment, and commits him to the custody of the marshal or his deputy, if either happen to be present, until the required bail is given, *held*, that the marshal is entitled to a fee for attendance at the court, and for the service of a guard, if such service is rendered and was necessary; and the marshal, not the commissioner, is the judge of such necessity.

In this case a rule for retaxation of costs was granted upon a motion founded upon an affidavit of the defendant, who had pleaded guilty. A copy of the rule was duly served upon the marshal, and he filed an answer in support of the costs as taxed, and the matter was heard in open court.

V. S. Lusk, in support of rule.

C. M. McLoud, for marshal.

DICK, D. J. The exceptions presented in the affidavit to the costs taxed before the commissioner are as follows:

(1) The marshal charges for service of the warrant, when there was no valid service.

(2) The marshal charges expenses for 14 days in endeavoring to arrest the defendant, when the defendant might have been easily arrested, as he made no effort to evade the process of the law.

(3) The marshal charges for attending the court of the commissioner and guarding the defendant, when there was no necessity for such service, as the defendant was upon bail.

As to the first exception it appears in evidence that the deputy marshal, while he had the warrant in his hands, met the defendant and read the warrant to him, and told him that he was under arrest.

The defendant at once submitted to the authority of the deputy marshal, who told him that he might depart from custody if he would promise to attend the commissioner's court on a certain designated day. The defendant agreed to the proposition and went off, and did not afterwards appear at the time and place designated.

I am of opinion that this was not such a service of the warrant as entitled the marshal to the fee charged. The service of a commissioner's warrant in a criminal case consists of more than a mere arrest, as the marshal must keep the defendant in custody until he is carried before an examining magistrate for a preliminary hearing upon the charges in the warrant. Where an arrest is made on a commissioner's warrant, the officer making the arrest has no authority in law to take bail, and if he voluntarily allows the defendant to depart from custody before the case has been heard by the magistrate, it is a voluntary escape. The liability of the officer is absolute, and cannot be relieved by a subsequent arrest of the defendant; but the warrant is not invalidated, and the defendant may be retaken under the same warrant, and by the same officer. The misconduct of the officer does not prevent an arrest, as the public good requires that the defendant should be brought to justice. 1 Chit. Crim. Law, 61.

The rule of law is somewhat different in mesne process in civil cases, as the officer becomes special bail if he allows a defendant to depart out of custody without giving a bail-bond. Upon final process of execution if there is a voluntary escape the liability of the officer is absolute. If there is a negligent escape the officer may retake the prisoner on fresh pursuit and hold him, so as to relieve his liability. *Adams v. Turrentine*, 8 Ired. 147.

The action of the deputy marshal in this case, and the submission of the defendant to the control of the officer, constituted a valid arrest. Whether acts constitute an arrest depends upon the intent of the parties at the time. An arrest may be made without touching the person of the defendant at the time, if he voluntarily submits to the process of the law in the hands of the officer. *Jones v. Jones*, 13 Ired. 448.

Although there was a valid arrest in this case there was not a due service of process, and the marshal is not entitled to the fee charged. In his answer the marshal insists that the defendant was retaken on the warrant on a subsequent day and carried before the commissioner for a preliminary hearing. The evidence shows that the defendant, previous to the second arrest, and while he was still lurking in the woods and evading the officer, had an appearance-bond, with

sureties, prepared by his brother, I. N. Ebbs, with a condition to appear before the commissioner for an examination on the twentieth day of August. This bond was presented by I. N. Ebbs to the commissioner and was by him accepted in the absence of the defendant, and the deputy marshal knew that said bond had been accepted. The defendant made his appearance at the time and place designated in the bond. Before the hearing of the case commenced the commissioner, then regarding the said bond as erroneous and void, gave a verbal direction to the deputy marshal to arrest the defendant and hold him in custody until the case could be heard. The deputy marshal made an arrest on the warrant which he had long had in his hands.

I am of the opinion that when the appearance-bond was accepted by the commissioner, and the deputy marshal was advised of that fact, the warrant in his hands was virtually superseded and did not authorize an arrest. If the bond accepted by the commissioner was irregular, or in any way insufficient, he ought to have proceeded to have the defendant arrested in the manner provided in section 1019, Rev. St. This verbal direction to arrest was without legal force and authority. An examining and committing magistrate has no power verbally to command an arrest, except for a felony or breach of the peace committed in his presence, or for contempt in open court, or so near as to disturb his official proceedings. After hearing a case he may, by verbal order, direct an officer to take a defendant into custody until a proper *mittimus* can be prepared, but in no case can he commit a defendant to prison without a written warrant setting forth the cause of such commitment in specific terms.

The correctness of the form of the bond, as an appearance-bond, and the solvency of the sureties, are not denied, but the counsel of the marshal insisted that the bond was erroneous and void, as the commissioner had no power to take such a bond in the nature of a recognizance in the absence of the principal, and before a hearing of the matter.

It is well-settled law in this state that a bond duly signed, with sureties, and with a condition for the appearance of the principal in a criminal case before a court, accepted by a person authorized to take bail, is good as a recognizance. *Edney's Case*, 2 Winst. 463; *Houston's Case*, 76 N. C. 256.

In the case of a formal recognizance, the obligation is generally acknowledged by the parties in open court and entered of record, and they need not sign their names; but in the case of a bond in the

nature of a recognizance, where the parties sign their names, I can see no absolute necessity for the principal being present before the person authorized to accept such bond. During the absence of the principal the magistrate might refuse to accept such bond, but if he is satisfied that the bond was duly signed and sealed, and the sureties are sufficient and he accepts the bond, I am of the opinion that it is valid. At the common law, even in the case of a formal recognizance, where the defendant is an infant or in prison, and so absent, sureties were allowed to enter into recognizance of bail, and a warrant called a *liberate*, was issued by the person taking bail for the enlargement of the defendant. 2 Hale, P. C. 126.

If the bond in this case was as good as a recognizance, I am of opinion that it operated as a *supersedeas* of the warrant in the hands of the deputy marshal without any formal *supersedeas* writ. At the common-law an apprehension under a warrant could, in many cases, be prevented by a party going before a justice of the peace and finding sufficient sureties for his appearance to answer any indictment, and obtaining the *supersedeas* of the magistrate. This could be done even after an indictment found in a court. 1 Chit. Crim. Law. 46.

If process of arrest from a court after indictment could thus be superseded by a justice of the peace, I see no reason why a commissioner, having the powers of a justice of the peace in such matters, cannot supersede a warrant which he has issued to bring a person before him for an examination upon a charge of crime, by accepting a bond with sufficient sureties to secure an appearance in a bailable case, and where the defendant is entitled to have his witnesses heard upon the investigation.

I do not approve of this practice of accepting bail to prevent an apprehension upon legal process, and I will instruct the commissioners of this district not to adopt it, as I think it most proper and regular for defendants to enter into bond or recognizance in person before the magistrate, and that other proceedings should be in accordance with the usual course and practice of the courts. No justice of the peace can supersede the warrant of another without a formal and legal examination, (1 Chit. 36,) but we may reasonably suppose that a justice with whom a complaint was filed and who had issued the warrant, may supersede such warrant when the appearance of the defendant had been secured by him in taking a sufficient bond.

Commissioners are invested with many of the powers and functions of justices of the peace, and they act within the scope of such powers upon their own judgment and responsibility. A district attorney has

no authority to direct a marshal not to execute a warrant issued by a commissioner. *U. S. v. Scroggins*, 3 Woods, 529. He may appear before the commissioner and attend to the presentation of the evidence, but he is only counsel for the government. He cannot direct the commissioner in his judgment, or as to what course he shall pursue, or dismiss the proceedings. *U. S. v. Schumann*, 2 Abb. (U. S.) 523.

I am inclined to doubt the power of a federal judge, by writ of prohibition or otherwise, to control the discretion of a commissioner in the hearing of a cause before his order of commitment. The decision of a commissioner may in some things be reviewed upon writs of *habeas corpus* and *certiorari*, and rules of court may be adopted regulating the practice and modes of procedure in such inferior courts. As an examining and committing magistrate a commissioner has similar powers to those of a justice of the peace, in the state where he acts, and his proceedings must be agreeable "to the usual mode of process against offenders in such states." In this state a justice of the peace is authorized and directed to hear the witnesses of the defendant, and allow him reasonable time to employ counsel in his defence, and determine the matter after hearing evidence and argument on both sides of the case. The justice being vested with such powers and duties of investigation, he must necessarily have the incidental powers of continuing the matter to a future day, to enable parties to have a fair and full investigation, and also allowing a defendant bail in bailable cases, during such continuance of the cause. This course of procedure was adopted by the justice of the peace in *Queen's Case*, 66 N. C. 615; and the supreme court seemed to regard such course as regular and proper.

As the commissioner in this case adopted a similar course in accepting the appearance-bond of the defendant, he could not by a mere verbal order revive a superseded warrant, and legally direct an arrest of a person on bail, which had been accepted, before an examination of the merits of the case. I think that the deputy marshal made the charge with an honest belief that he was entitled to such fee for service of the warrant, and the commissioner is not blamable for approving the same, as required by the rules of court.

The second exception presented by the defendant is not fully sustained by the evidence. It appears that the warrant was issued on the sixteenth day of May, and that the defendant knew it was in the hands of the deputy marshal, and he used all the means in his power to evade an arrest. His brother, I. N. Ebbs, wrote to the deputy

marshal that if he would meet him at his house on the seventeenth day of July, an arrangement could be made for the surrender of the defendant and three other co-defendants. The deputy went to the place at the time designated, but a satisfactory arrangement was not made. The deputy, on his return, passed by a place where a number of men had met to have "a shooting-match." The defendant was there, and the deputy remained some time with him, but did not make an arrest, as he did not have the warrant in his possession. On several subsequent days the deputy made active efforts to arrest the defendant, but did not succeed until the day of the first arrest mentioned in considering the first exception.

The marshal is entitled to the expenses charged for the days his deputy endeavored to make an arrest previous to the seventeenth of July. I disallow the expenses for the subsequent days. When a warrant of arrest is put in the hands of an officer it is his duty, as soon as he conveniently can, to proceed with secrecy and diligence to apprehend the defendant. He must always be ready to perform the mandate of the warrant. In this instance I am disposed to hold the officer to the highest and strictest rule of duty, for when he subsequently made an arrest he voluntarily allowed the defendant to depart from custody on a promise to appear before the commissioner for trial on a future day. He had no right to show favor or trust to the promise of a criminal who had so long been evading the process of law. At the common law it was allowable for a constable, when he had made an arrest without a warrant in a case of a petty nature, to take the defendant's word for an appearance before a magistrate if he was of good repute and there was no probability of his absconding, (1 Chit. Crim. Law, 59;) but such indulgence was not allowable in this case.

As to the third exception, the evidence shows that the defendant had given bond to appear before the commissioner on the twentieth day of August, and we have above decided that such bond was valid. While under bond, and before the case was heard, there was no necessity for guarding him, as he was in the constructive custody of the court, and his sureties were his keepers. The defendant gave a new bond for his appearance on the twenty-seventh day of August, and the custody in which he was placed by the verbal order of the magistrate was unlawful.

The law fixes no time and place for the session of a commissioner's court, and the marshal and his deputies are not required to be present at such court, except where they have process to return and defend-

ants to bring in and guard. When a defendant is admitted to bail he is placed in the custody of his sureties, who have power to arrest him at any time they may desire; and they must have him before the court at the time and place designated in the bond, and they are not freed from this responsibility until the defendant is discharged, admitted again to bail, or placed in the custody of an officer of the law. If the magistrate hears the case and decides that the defendant shall give bail for his appearance in court to answer an indictment, and the defendant fails to give sufficient bail, he may be committed to prison, and if no regular officer can conveniently be found the *mittimus* may be directed to any person who shall have power to execute the same. Bat. Rev. Ch. 33, § 97; *Dean's Case*, 3 Jones, (N. C.) 393.

In such a case there is no legal requirement for the marshal or his deputy being present, but if either should be present and the defendant is committed to the custody of such officer, then the marshal would be entitled to charge for his own attendance and the service of a guard, if such service was rendered and was necessary, and the marshal must judge of such necessity. He would be responsible if the defendant should make an escape through his negligence in not summoning a guard. The law does not require or expect an officer, without assistance, to keep the custody of a prisoner charged with crime. If he relies upon his own vigilance, strength, and courage, and the prisoner escapes, he is not excused, no matter how earnestly and faithfully he endeavored to perform the duty imposed upon him. When the marshal or his deputy arrests a person under a warrant, the law requires him to carry the alleged offender before some examining magistrate as soon as the circumstances will permit. He may lodge the prisoner in the common jail, or resort to other modes of confinement, if any necessity or serious emergency should require such a course,—*he must keep the prisoner*. Nothing, however, but obvious necessity will authorize an officer to lodge a prisoner in jail before an examination and regular written commitment by a magistrate. This course may be adopted if the arrest is made in or near night, whereby he cannot attend the magistrate, or if there be danger of a rescue, or the party be too ill to appear before the magistrate, etc. 1 Chit. Crim. Law, 59; *State v. James*, 78 N. C. 455.

When a prisoner is brought before the magistrate he is still in the custody of the officer, who must keep him securely until he is disposed of in due course of law. As this high and strict responsibility is imposed by law upon the marshal he is authorized to summon the

necessary assistance, and he can keep such assistance as long as the responsibility continues, and he is entitled to the fees allowed by law for such important and responsible service. The rule of this court, which requires the commissioner to determine the question whether a guard is necessary for the marshal when a prisoner is before the court under arrest, must be set aside, as it is contrary to law. The marshal alone can determine this question, and say how far he is willing to subject himself to the chances and responsibilities of an escape. The marshal cannot be relieved by any action of the commissioner, as he has no power to commit a prisoner brought before him for examination until a cause of commitment judicially appears. When any commitment is ordered, a written *mittimus*, setting forth the cause, must be directed to the marshal or his deputy, commanding him to deliver the prisoner to the keeper of the common jail, and when the mandate of the warrant is obeyed then the marshal is relieved from the responsibility of custody. *Randolph v. Donaldson*, 9 Cranch, 78.

The marshal is clearly entitled to the fees charged for attending court and guarding the defendant on the twenty-seventh of August, as the defendant was put in his custody by order of the commissioner until sufficient bail was given for an appearance at court to answer an indictment. After hearing a case and determining to hold a defendant to bail, the commissioner can by verbal order put the defendant in custody of an officer until the bail required is given, but the officer cannot commit to jail without a written *mittimus* from the commissioner.

It is ordered that the clerk of this court retax the costs in this case in conformity with this opinion.

*In re WARNE, Bankrupt.***(District Court, E. D. Pennsylvania. January 10, 1882.)***1. DISCHARGE—FRAUD.**

The fraud contemplated by the statute as a bar to the bankrupt's discharge is fraud in fact, involving moral turpitude—intentional wrong.

2. SAME.

In the absence of proof of such intentional wrong, the failure of a bankrupt to deliver over to the assignee property which he had given to his daughter will not bar his discharge, even though the transfer to the daughter may have amounted to constructive fraud, and have been void as against creditors.

3. FAILURE TO PRODUCE BOOKS—PERJURY.

The fact that after the bankrupt testified that he had not kept certain books of account, he found and produced such books, will not bar his discharge, it not appearing that there was intentional false swearing, or any motive for concealment.

In Bankruptcy. Exceptions to register's report upon an application for discharge.

One of the specifications against the discharge was that the bankrupt had not delivered to the assignee a horse, phaeton, and harness belonging to him. On this point the register reported as follows:

"The horse, phaeton, and harness are also charged as being the bankrupt's property, and not delivered to the assignee. Of this the bankrupt says: 'The horse called 'Major,' this my daughter claimed. That is not included among those I testified to. It is not in my schedules, nor in the appraisal list of the assignee. I guess my daughter has that horse now. She also claimed the phaeton, which she still has, and the harness.' Again: 'I am agent for my daughter. She is a young, unmarried lady, living with me. She is of age, I think, 22 or 23.' In this connection it is proper to refer to the fact that the farm was bought by Warne's mother-in-law; *the horse*, and a *stallion*, by his wife. Now, in relation to all these transactions by the three generations of ladies,—the mother-in-law, mother, and daughter,—it is difficult for the register, with the light before him, to pass judgment. If the means which acquired the bulk of the bankrupt's estate are derived from their separate estates, or independently of the bankrupt, then they had as much right to buy as strangers; if from the bankrupt, then they belong to the assignee, and one effect of this non-delivery is to prevent the bankrupt's discharge. Neither the opposing creditors nor the bankrupt has probed this matter to the bottom, the former contenting themselves with showing that Mrs. Warne paid \$1,000 for the stallion in cash, and that the daughter kept the horse and phaeton. Under the ordinary presumption that property found in possession of the head of the family was paid for with his means, it seems that it was Mr. Warne's plain duty, when his attention was called to these

* Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

transactions, to show that he did not furnish the money, or, if he did, that it was done at a time when he had a right to furnish it. And it may possibly be that he can show this. As the evidence stands, however, at present, the register thinks that Mr. Warne stands in the light of one whose property is retained under cover of his family, and that the specification must be sustained."

Another specification against the discharge was that the bankrupt had not kept proper books of account. Upon the final examination the bankrupt swore that he had not kept such books, but he afterwards found a properly kept cash-book, and other books, from which an expert accountant said he could prepare proper accounts, etc. Upon the petition of the bankrupt the register reopened the case, admitted this testimony, and reported to the court conformity with the bankrupt act in all respects except in this: that the bankrupt had not delivered the horse, phaeton, and harness which were claimed by the bankrupt's daughter. Both the creditors and the bankrupt excepted to the action and report of the register, and the creditors filed additional specifications at bar against the discharge, on the ground that the bankrupt had sworn falsely when he said that he had not kept proper books of account.

Hon. W. W. Schuyler and Sharp & Alleman, for bankrupt.

W. D. Luckenbach, for creditors.

BUTLER, D. J. The register finds that the bankrupt was guilty of fraud, in failing to deliver to his assignee a horse, phaeton, and harness, as charged in the specification, and that he is not, therefore, entitled to a discharge.

It is probable the register is right in finding that this property belonged to the bankrupt, and should have been returned to the assignee; but we cannot accept his conclusion that the failure to return it, standing alone, shows such fraud as forbids the bankrupt's discharge.

The most reasonable inference from the facts is that he did not know it should be returned,—that he believed it to be his daughter's. Accepting the creditor's allegation that he had given it to her, it was hers as respects everybody but creditors. To hold that he was familiar with the law on the subject, and consequently knew that the property should be returned, would not be justifiable. At most, his failure to return it should be regarded as a mistake. As respects the question of discharge, such a mistake is unimportant. The transfer to the daughter may have amounted to constructive fraud; but the failure to deliver to the assignee, through want of knowledge,

would hardly amount even to this. The fraud contemplated by the statute, as a bar to the bankrupt's discharge, is fraud in fact, involving moral turpitude—intentional wrong. *Neal v. Clark*, 95 U. S. 704; *Sharpe v. Warehouse Co.* 37 Leg. Intel. 85; *Stewart v. Platt*, Id. 118; *In re Wyatt*, 2 N. B. R. 280.

The register's act in reopening the case and admitting further proof was right.

The specifications subsequently prepared, and filed on the argument, should have been filed while the matter was before the register, and been reported upon by him. In the absence of a report they cannot be satisfactorily considered, and we do not think the case should be kept open by another reference. I may say, however, that I do not find in the case anything to sustain these specifications. No motive is suggested, or can be discovered, for the false swearing attributed to the bankrupt. His testimony was directly against himself. The only admissible inference is that he was laboring under a misapprehension, either as respects the question propounded, or the facts of which he spoke. Nor does it appear that he had any motive to conceal his books. They contained nothing that could be used against him, so far as appears; and their production was essential to his own case. I find no satisfactory evidence that he was guilty of wilful neglect or misconduct respecting his books.

SHARP, Assignee, v. PHILADELPHIA WAREHOUSE CO.*

(Circuit Court, E. D. Pennsylvania. October 25, 1881.)

1. PREFERENCE—CONSIDERATION—COMPOUNDING MISDEMEANOR AFFECTING PUBLIC INTERESTS.

An agreement by a creditor not to prosecute a debtor for a misdemeanor affecting public interests is an illegal consideration, and, as against the debtor's assignee in bankruptcy, will not support a transfer of the debtor's property to the creditor received with knowledge of the debtor's insolvency.

Hearing on Bill, Answer, and Proof.

The material facts of the case, as shown by the evidence, were as follows:

*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

The firm of E. & C. Stokes failed on January 18, 1878. For a number of years they had received goods on storage from various persons, and had issued warehouse receipts therefor. At the time of their failure the Philadelphia Warehouse Company held a number of these warehouse receipts, on which it had made large advances. Learning of the failure, the warehouse company sent to E. & C. Stokes' store, and finding that there were large deficiencies in the pledged goods, threatened E. & C. Stokes with a criminal prosecution under the "warehouse act."* On the next day a gentleman by the name of German Smith called upon the president of the warehouse company. He represented himself as a friend of E. & C. Stokes, and asked what could be done to avoid the criminal prosecution. The president replied that if the company could be paid or secured \$10,000, which was less than the amount of the deficiency, he would recommend the company not to prosecute. The next day German Smith called with Mr. Elton, the father-in-law of E. Stokes. Smith offered to ship the company 150 bags of sumac in settlement. This offer was declined, but finally the company accepted a judgment bond for \$10,000, signed by Elton and Smith, with the understanding that Smith should give the company 30 tons of sumac then in Philadelphia, and should ship them 90 tons more; that the proceeds of this sumac should be credited on the bond; and that his liability should then cease. The company on its part agreed not to institute criminal proceedings. The company received the 30 tons of sumac, and sold 10 of it, realizing \$470.28. Subsequently it received and stored the remaining 90 tons, and still later, upon Mr. Elton making payment of the bond, it transferred the sumac to him, giving him credit for the 10 tons sold. Meanwhile, in February, 1878, E. & C. Stokes, upon the petition of creditors, were adjudicated bankrupts. It then transpired that German Smith was their debtor, and that the sumac shipped by him was shipped in payment of their claim. The warehouse company learned of this fact after they had received but 30 tons of the sumac, and before the remaining 90 tons had been shipped. The assignee in bankruptcy filed this bill to recover from the warehouse company the value of all the sumac received.

R. L. Ashhurst and Samuel S. Hollingsworth, for complainant.

George Junkin, for respondent.

BUTLER, D. J. The plaintiff seeks to recover from defendants the value of 150 tons of sumac, received by the latter from German

*The Pennsylvania act of assembly of twenty-fourth of September, 1866, § 2, provides that no receipt or voucher for any goods shall be given by any person, unless the goods shall be in his possession and under his control.

Sec. 4. The maker of such receipt or voucher shall not sell, encumber, ship, transfer, or in any manner remove beyond his immediate control the goods or property, without the return of the receipt or voucher therefor.

Section 5 enacts that any person violating the act shall be deemed guilty of fraud, and upon conviction be fined and imprisoned.

Section 108 of the act thirty-first of March, 1860, provides that any bailee of property, who shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner, shall be guilty of larceny, and punished as in cases of larceny of like property.

Section 9 enacts that any person, having a knowledge of the actual commission of larceny, who shall take money or other reward, or promise thereof, to compound the crime aforesaid, he shall be guilty of a misdemeanor, and on conviction be fined and imprisoned.

Smith,—which the plaintiff alleges were delivered by Smith in pursuance of an agreement between himself, (Smith,) the Messrs. Stokes, (who were insolvent,) and the defendants,—in discharge of Smith's indebtedness to the Stokes, on account of the latter's indebtedness to the defendants,—and consequently in fraud of the bankrupt laws.

To sustain the allegation of fraud, it must appear that the defendants had knowledge that the sumac belonged to Stokes, or was furnished in payment of indebtedness to them, with their consent, and that the defendants were aware of their financial condition. Of the latter fact, there is no doubt; the defendants concede that they were aware of Stokes' insolvency, at the outset of the transaction. It does not appear, however, that they were aware at that time of Smith's indebtedness to Stokes, and that the sumac was furnished on their account, in discharge of his indebtedness to them. We believe they were not aware of this, at the outset, nor until 60 tons had been furnished. They had reason to believe, and we think did believe, that Smith was contributing his own property to relieve his friends,—for whose welfare he manifested great solicitude,—without being under any pecuniary obligation to them. In this, however, the defendants were mistaken. Smith was indebted to Stokes in a considerable sum, and by arrangement with them undertook to furnish the sumac in discharge of this indebtedness. The defendants having received the 60 tons in ignorance of these facts, are not liable to the charge of fraud, preferred against them, as respects it. After this, however, and before more had been shipped, they were fully informed of the circumstances, just adverted to. The balance was, therefore, received with knowledge that it was delivered in discharge of Smith's indebtedness to Stokes, and in reduction of the latter's assets, to that extent. Nevertheless, if the defendants, at the outset of the transaction, (while ignorant of the relation between Smith and Stokes,) acquired a right to the sumac, or its delivery, (as upon contract for valuable consideration, with Smith, as owner,) the subsequent knowledge referred to, would not affect the right, but be wholly immaterial. They had contracted for it with Smith, whom they believed to be the owner, and had taken his bond,—in part payment of which the sumac was to be furnished. If this contract was valid in law, the defendants had acquired an interest in the sumac, and a right to demand its delivery, before they were informed of the relations between Smith and Stokes. The case thus turns, as respects

the 90 tons, on the validity of the contract with Smith. The only consideration for this, as the defendants admit, was an agreement on their part not to prosecute Stokes for a crime which they had committed, or were charged with committing. This crime consisted in clandestinely abstracting property deposited with them as warehousemen, and applying it to their own use,—for which they were liable to prosecution under the fifth section of the Pennsylvania statute of September 24, 1866, if not also under the 108th section of that of 1860. The crime defined by the first of these statutes is a misdemeanor, while that defined by the last is a felony. It is not essential to determine whether Stokes might have been prosecuted under the latter statute, inasmuch as the misdemeanor here involved (if the offence be no more) is of such a character—so seriously affects the public interests—that an agreement not to prosecute cannot be regarded as a consideration for a promise to pay money, or deliver goods. While misdemeanors of a private character, affecting individuals principally, may be compounded, and an obligation taken for restitution of property obtained, or payment of damages suffered, may be enforced, public policy forbids that misdemeanors which seriously affect the public welfare, shall thus be disposed of. Conceding the offence charged against Stokes to have been a misdemeanor merely, it was, we repeat, a very serious one to the community. They were engaged in an important public employment, involving and inviting trust and confidence,—an employment regulated by statute, and intimately connected with commerce. The compounding of offences committed by persons engaged in such employment would seriously tend to imperil the public interests. While strongly inclining to the belief that Stokes were liable to prosecution under the act of 1860, it is sufficient for the purposes of this case to say that the defendants' promise not to prosecute, even if the crime was limited to that prescribed by the statute of 1866, afforded no lawful consideration for Smith's promise to deliver the sumac. It follows that the defendants had acquired no interest in the sumac, undelivered, or right to demand it, at the time of receiving information of Smith's relations to Stokes; and receiving it afterwards with knowledge that it was being furnished in payment of the former's indebtedness to the latter, the transaction must be treated as a preferential payment by Stokes to them (the defendants) through Smith.

It is of no consequence that the defendants subsequently transferred

the sumac to Mr. Elton, who united with Mr. Smith in the bond—leaving him to apply it to the joint obligation. The defendants could dispose of it as they saw fit, and did so.

They must be held accountable for the net proceeds of the 90 tons received under the circumstances stated.

McKENNAN, C. J., concurred.

In re WOLFE & Co., Bankrupts.*

(District Court, E. D. Pennsylvania. December 14, 1881.)

1. DISCHARGE—DELAY IN APPLICATION—FINAL DISPOSITION OF CAUSE.

After an adjudication in bankruptcy in an involuntary proceeding a meeting of creditors was held, an assignee elected, and a deed of assignment to him executed by the register. The assignee never expressed acceptance of the trust or entered security or filed an account, but, being also assignee of the bankrupts under a voluntary assignment for the benefit of creditors made prior to the bankrupt proceedings, he settled the estate and filed his account in the state court. The bankrupts then filed their petition for a discharge. Subsequently the state court, having confirmed the assignee's account, discharged him from the trust. *Held*, that the bankruptcy proceedings must be regarded as having come to an end by abandonment prior to the petition for discharge, and that the petition was, therefore, not presented before the final disposition of the cause, as required by act of July 26, 1876. *Held, further*, that even if the proceedings could be regarded as still alive, the petition would have to be dismissed for non-compliance with the bankrupt laws in prosecuting the case.

In Bankruptcy.

Exception to report of register upon application of bankrupts for discharge. The discharge was resisted on the ground of unreasonable delay in applying for it. On this point the register reported as follows:

"A petition was filed against the bankrupts November 17, 1873, and in January, 1874, John Dobson was appointed assignee. He does not appear from the record to have accepted the trust, although an assignment executed by the register is among the papers. He had been, by deed of the bankrupts of October 24, 1873, vested with the title to all their estate in trust for the benefit of their creditors. He proceeded with the settlement and filed his account in the court of common pleas No. 4 of the county of Philadelphia in December, 1876. It was referred to Wayne MacVeagh, Esq., as auditor. The auditor's report was filed in said court March 19, 1878, and confirmed *nisi*. On May 1, 1878, the bankrupts filed their petition for discharge, and on July 10, 1880,

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Mr. Dobson was by the court of common pleas aforesaid discharged from his trust. The record in bankruptcy is therefore deficient in showing no report from the assignee in bankruptcy. The bankrupts have, however, presented a copy of the auditor's report, Mr. Dobson's account, notice published by him, and his petition for discharge and decree thereon, and they are herewith forwarded. The deficiency is, therefore, substantially supplied."

The register, after quoting the provisions of the act of congress of July 26, 1876, (19 St. at Large, 102,) which enacted that the application might be made "before the final disposition of the cause," proceeded as follows:

"Under the circumstances of the case I think the action of the assignee, as before set forth, may be considered as if in the bankruptcy proceedings, and that within the meaning of the act quoted the application of the bankrupts for their discharge was before the final disposition of the cause."

To this report exceptions were filed by creditors.

E. H. Weil and George Peirce, for exceptants.

William Morris, for bankrupts.

BUTLER, D. J. November 26, 1873, Erasmus D. Wolfe and David H. Wolfe were adjudged bankrupts. January 19, 1874, a meeting of creditors was held and an assignee elected. Four days later the election was approved by the court, and the assignee required to give security in \$10,000, as suggested by the register, the deed of assignment executed by the register being placed upon file. Here the proceedings terminated. Nothing further was done. The assignee neither gave security as required by the court, nor expressed acceptance of the trust, as required by the statute. The proceeding, in this incomplete condition, came to an end by abandonment.

A voluntary assignment for the benefit of creditors having been made on the twenty-fourth of October, 1873, the parties turned to it, and pursued the remedies thus afforded, through the instrumentalities of the state court. Between the proceeding on this assignment and the proceeding in bankruptcy there is no connection whatever. Finding the remedies afforded by the state court sufficient for their purposes, the parties contemplated no further prosecution of the proceeding here, and permitted it to die by inaction. The petition for discharge, filed four years later, (when creditors were pressing for judgment,) had nothing whatever to rest upon. The attempt thus to revive the defunct proceeding was abortive. There was nothing to revive. The proceeding itself was an abortion, dying in the throes of birth. If it could be regarded as alive, however, the petition would

still have to be dismissed for non-compliance with the bankrupt laws, in prosecuting the case. *In re Young*, 9 FED. REP. 146, bears no resemblance to this case.

The petition must be dismissed.

In re HENDERSON.

(Circuit Court, S. D. Ohio, W. D. February 23, 1882.)

INVOLUNTARY BANKRUPTCY.

In re Henderson, 9 FED. REP. 196, affirmed.

On Review from the District Court.

Bateman & Harper, for petitioning creditors.

Follett, Hyman & Dawson, *contra*.

BAXTER, C. J. The decision of the district court will be affirmed, for the reasons stated by Judge Swing, as reported in *Re Henderson*, 9 FED. REP. 196.

BIGELOW CARPET CO. v. DOBSON.*

HARTFORD CARPET CO. v. SAME.*

(Circuit Court, E. D. Pennsylvania. January 27, 1882.)

1. INFRINGEMENT—ASCERTAINMENT OF DAMAGES.

In cases of wilful infringement respondents ought to be held to the most rigid accountability, and no intendment ought to be made in their favor founded upon the alleged inconclusiveness of the complainant's proof of loss. Such proof ought to be interpreted most liberally in favor of complainants, within the limit of an approximately accurate ascertainment of their damages.

2. SAME.

Where, in a suit for infringement of a patent for a carpet design, the evidence showed the quantity of complainants' carpet sold during the season of its first introduction, its cost, the profit upon it, the quantity of the infringing carpet sold by respondents during the following season, and that there was a decline in complainants' sales, the measure of damage is the profits which would have accrued to complainants upon the quantity of carpets sold by respondents. This latter quantity must, under the circumstances, be presumed to have displaced an equal quantity of complainants' carpets.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Exceptions to master's report in three cases—two of them by the Bigelow Carpet Company, for infringement of letters patent Nos. 10,870 and 10,778, for designs for carpets; and the third by the Hartford Carpet Company, for infringement of letters patent No. 11,074, for designs for carpets. The respondents had made no defence, and final decrees having been entered against them, the cases were referred to a master to ascertain and report the damages. In each case complainants proved that during the first six months after the introduction of the design a specific quantity of the carpet was sold, and they also gave evidence of its cost and their profit on it. The quantity of the infringing carpet subsequently sold by respondents was also shown. Complainants claimed that the effect of respondents putting upon the market carpets of the same design at a less price was to decrease the demand for the original carpet, and compel a change of design. They claimed damages based upon estimates made by their witnesses as to the probable amount of their sales of the original carpet if respondents had not infringed, and no other cause had occurred to diminish the demand. They also claimed the expense of changing their designs, as estimated by their witnesses. The master reported that while the effect of the infringement was to decrease the complainants' sales, he was entirely unable to find from the evidence the amount of their damage, or even to approximate its sum, and he therefore awarded only nominal damages. To this report complainants filed exceptions.

A. v. Briesen and Joseph C. Fraley, for complainants.

George E. Buckley, for respondents.

MCKENNAN, C. J. These were all suits for infringement by the respondents of designs for carpets patented to the complainants. The infringing designs are exact counterparts of the patented ones, and carpets embodying them were put upon the market by the respondents some time after the date of the patents and the introduction of carpets containing the designs described in them by the complainants. No defence was made by the respondents, and they therefore occupy the attitude of wilful infringers.

Under these circumstances the respondents ought to be held to the most rigid accountability, and no intendment ought to be made in their favor founded upon the alleged inconclusiveness of the complainants' proof of loss. On the other hand, such proof ought to be considered and interpreted most liberally in favor of the complainants, within the limit of an approximately accurate ascertainment of their damages.

The master has not so dealt with the evidence presented to him, and has, therefore, fallen into error in his conclusion. He has found nominal damages only in favor of the complainants, although they furnished proof by which the damages claimed by them might, to some extent at least, be legally measured.

In this category is the evidence of the number of pieces and yards of the complainants' carpets manufactured during the season of its first introduction upon the market, the cost per yard of their manufacture, and the prices at which they were sold in the market; the number of pieces and yards of infringing carpets made and sold by the respondents in the following season, and the very large decline in the complainants' sales during this period. It furnishes the means of accurate computation of the complainants' profits, and of the extent to which the market was occupied by the respondents. All that is left for presumption is that the infringing carpets displaced in the market the complainants' carpets, and hence that the profits which would have accrued to them upon the quantity of carpets put upon the market is the measure of their damages.

This presumption, as against a wrong-doer, is not unreasonable, and it has the sanction of numerous decisions. *Putnam v. Lomax*, 9 FED. REP. 448; *American Saw Co. v. Emerson*, 8 FED. REP. 806; *McComb v. Brodie*, 2 O. G. 117; *Westlake v. Cartter*, 4 O. G. 636.

Upon this basis there is no difficulty in stating an account against the respondents; and this is the only one upon which, under the evidence, the complainants' damages can be computed. It is enough for us to say that the losses claimed for the entire decline in the complainants' sales, and on looms, are too remotely connected with the defendants' acts as their supposed cause, and hence are too speculative in their character to entitle them to allowance.

It sufficiently appears that the respondents made and sold 20 pieces of 55 yards each, 1,100 yards in all, of carpets containing the design described in No. 30 of April term, 1879, and that the complainants' profit upon carpets of that design was 67 cents per yard. They lost, therefore, this sum upon 1,100 yards, and their damages amount to \$737, for which a final decree must be rendered in their favor.

In No. 34, April term, 1879, which is founded upon the patent for what is popularly called the "Pagoda Pattern," the respondents made 20 pieces of 50 yards each, in all 1,000 yards, the profit of complainants for like carpet being 75 cents per yard. The respondents have not disclosed what became of the carpets thus made by them, and

they are, therefore, held accountable for them as if put upon the market. The complainants' damages in this case are, then, 75 cents upon 1,000 yards, equal to \$750, for which a final decree will be entered in their favor.

In No. 35, April term, 1879, the respondents made 53 pieces of the Chinese Lantern pattern of 50 yards each, but sold only 35 pieces, the rest having been sealed up by the marshal.

The complainants' damages in this case are, therefore, 75 cents upon 1,750 yards, amounting to \$1,312.50, for which a final decree will be entered in their favor.

MAURY & Co. v. CULLIFORD & CLARK.*

(*Circuit Court, E. D. Louisiana. December 23, 1881.*)

1. ADMIRALTY JURISDICTION—CHARTER-PARTY—MARITIME LIEN.

A maritime lien is not essential to give the courts of the United States admiralty jurisdiction. In the charter-party in this case there is a complete contract for maritime services to be rendered; it is a maritime contract, and the United States courts have jurisdiction over an action for damages for its breach.

2. CHARTER-PARTY—CANCELLATION OF CONTRACT.

The notification by the libellants to the defendants that they would hold them in damages for non-compliance, and the refusal of the libellants to give orders after the time for fulfilling the contract had expired, are not good grounds for construing the charter-party to be cancelled.

The facts are set forth in the opinion of the court.

Thomas J. Semmes, for libellants.

John A. Campbell, for defendants.

PARDEE, C. J. The record shows the following facts:

(1) That June 12, 1879, the parties entered into a contract of charter in the terms following, to-wit:

"It is this day mutually agreed between Messrs. Culliford & Clark, owners of the good screw steam-ship called the *Romulus*, or boat of similar size, of 1,442 tons gross register, and 922 tons net register, say from 4,000 to 4,500 bales cotton, now whereof ——— is master, of the one part, and Messrs. J. H. Maury & Co., of Mobile, merchants and charterers, of the other part, that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, having liberty to take outward cargo for owners' benefit, but not West India or infected ports, proceed to the South-west pass or Key West, at captain's option, for orders, to be given immediately upon arrival, to load at Pensacola or Mobile, one port only, or so

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

near thereunto as she may safely get, and there load from the said charterers or their agents a full and complete cargo of cotton, in square bales, to be compressed in Taylor or equally good presses, at ship's expense, as customary, not exceeding what she can reasonably stow and carry over and above her cabin, tackle, apparel, provisions, furniture, engine-room, machinery, and coals, and being so loaded shall therewith proceed to Liverpool, or to a safe port on the continent between Havre and Hamburg, Holland and Dunkirk excepted, both inclusive, or to Revel, one port, as ordered in signing-bills of lading, or so near thereunto as she may safely get, and deliver the same agreeably to bills of lading, and so end the voyage. (Restraint of princes and rulers, the dangers of the seas, rivers, and navigation, fire, pirates, enemies, and accidents to machinery or boilers during the said voyage, always excepted.)

"Eighteen working days are to be allowed the said charterer (if the ship is not sooner dispatched) for loading; to count from the time the steamer is ready to receive cargo and written notice thereof by the master to the charterers or their agents; to be discharged as fast as the custom of port will permit. The cargo to be loaded and discharged according to the custom of the respective ports. Charterers to have option of ordering the steamer from port of call to an Atlantic port to load under this charter-party; all conditions remaining the same as within. In the event of the steamer being ordered to load at Mobile, charterers to pay half the lighterage incurred. Should the steamer be ordered to Havre, Mr. F. Dennis, or charterers' assignees, to transact the ship's inward business for $\frac{1}{4}$ per cent.

"And the said charterers do hereby agree to load the said vessel with said cargo at her port of loading, and also to receive same at her port of delivery, as herein stated, and also shall and will pay freight as follows: At the rate of, if discharged at Liverpool, seven-sixteenths per pound gross weight, delivered; if discharged at any other safe port on the continent, seven-sixteenths per pound gross weight, shipped; if discharged at Revel, one-half pence per pound gross weight, shipped; for cotton in square compressed bales, with 5 per cent. primage thereon. Payment whereof to become due and be made as follows: Cash for ordinary disbursements at port of loading, if required, not exceeding £—, to be advanced to the master by the charterers' agents, at the current rate of exchange, against the captain's draft, at issuance, on the consignee or agents, together with insurance, and a commission at $2\frac{1}{2}$ per cent., and the remainder, on the true delivery of the cargo, in cash without discount. Lay days not to commence before the fifth of October, and merchants to have the option of cancelling this charter-party should steamer not arrive at South-west pass or Key West by the twentieth of October. And also shall and will pay demurrage the sum of 40 pounds British sterling per day, to be paid day by day for each and every day the steam-ship be detained over and above the said laying days and times as herein stated, but the vessel not to be required to remain on demurrage longer than 10 days. The steam-ship to be consigned to the charterers, or their agents, at the port of loading, paying $2\frac{1}{2}$ per cent. commission. The master to sign bills of lading at current rates of freight, if required, without prejudice to this charter-party; but should the aggregate freight by bills of lading amount to less than the total chartered freight, the master to be paid the difference in cash before sailing.

"And for the true performance hereof each of the said parties doth hereby bind himself and themselves unto the other in the penal sum of estimated freight, — pounds of good and lawful money of Great Britain; it being agreed that for the payment of all freight, dead freight, and demurrage the said master or owners shall have an absolute lien and charge on the said cargo.

"Five per cent. commission is due on the execution of this charter-party to

Stoddard Bros., Liverpool, by whom the steam-ship is to be reported at the custom-house on her arrival at Liverpool, or by their agent at any other port of discharge."

(2) That the said chartered ship *Romulus* did not *proceed with all convenient speed* with liberty to take outward cargo, etc., to the South-west pass, or Key West, at captain's option, for orders from said Maury & Co., but did proceed to New York, and from New York to Rouen, France, and from Rouen to Penarth, Wales, and from thence, October 29, 1879, to South-west pass, arriving there November 18, 1879, and then reporting to libellant for orders.

(3) That the defendants made from time to time various propositions to the libellant to furnish him a ship under the charter-party, as follows:

September 1, 1879, an offer was made to send the *Romulus*, then in New York, to arrive in September. This was declined as too soon. The same day an offer was made of the *Deronda*, then in Liverpool, to arrive in September. It does not appear whether the *Deronda* answered the charter or not. This offer was also declined, as the arrival would be too soon for libellant's engagements.

September 18, 1879, an offer was made of the *Douro*, to arrive at the end of October, which was declined as not complying with charter.

(4) That the defendants, Culliford & Clark, except as above set forth, made default and did not furnish the ship *Romulus*, or a boat of similar size, to the said Maury & Co., as by the aforesaid contract they had bound themselves to do.

(5) That by the failure of said Culliford & Clark to comply with the terms of their said contract the said Maury & Co. were compelled to pay, and did pay, higher rates of freight on the cargo contracted to be shipped on said *Romulus*, or boat of similar size, to-wit, on 4,500 bales of cotton, and suffered other damages as set forth on the libel filed in this case.

The first objection argued to the court is that the said charter-party is a mere preliminary or preparatory contract, having reference to services of a maritime nature to be rendered; and the case of *The Tribune*, 3 Sumn. 144 is quoted. An examination of this case shows that while Judge Story admitted the proposition that the admiralty has no jurisdiction over preliminary contracts leading to maritime contracts, he held that the jurisdiction of the admiralty does not depend upon the name of the instrument, whether it imports to be a maritime contract. He further held that an agreement for a charter-party to be made at a later period might amount to a present charter-party, notwithstanding a more formal instrument was contemplated.

In the charter-party recited in this case there is a complete contract for maritime services to be rendered; and no other instrument was contemplated at a later period, nor of a more formal character.

The next objection is that the court is without jurisdiction upon a contract of affreightment until there is a ship, a voyage, and an engagement for services, and cargo offered and accepted; and that an admiralty court has no cognizance of damages for breaches of unexecuted charter-parties. That where there is no freight offered and accepted there is no lien, is well settled. See leading case, *Vandewater v. Mills*, 19 How. 82.

The real question to be determined is, is a maritime lien essential to give the courts of the United States admiralty jurisdiction?

In *Ex parte Easton*, 95 U. S. 72, Mr. Justice Clifford quotes from 2 Story, Const. § 1666, approvingly, as follows:

"Admiralty jurisdiction embraces all contracts, claims, and services which are purely maritime, and which respect rights and duties appertaining to commerce and navigation."

And then Justice Clifford says:

"Maritime jurisdiction of the admiralty courts in cases of contracts depends chiefly upon the nature of the service or engagement, and is limited to such subjects as are purely maritime, and have respect to commerce and navigation."

In this case it was held that there was a maritime lien for wharfage. The syllabus in *Ins. Co. v. Dunham*, 11 Wall. 1, giving the point of the decision, is:

"As to contracts, the true criterion whether they are within the admiralty and maritime jurisdiction is their nature and subject-matter, as whether they are maritime contracts having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made."

And Justice Bradley, organ of the court, in the same case, says, after reviewing all the authorities:

"It thus appears that in each case the decision of the court, and the reasoning on which it was founded, have been based upon the fundamental inquiry whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended not on the place where the contract was made, but on the subject-matter of the contract. If that was maritime, the contract was maritime. This may be regarded as the established doctrine of the court."

In this case it was decided that a contract of marine insurance was a maritime contract, and there was no contention for a maritime lien.

A number of cases from the various circuit courts of the country,

bearing on this question, have been cited, and a large number can be found, which cases leave the question open—still unsettled. English authorities cited do not bear on the case, because of the different jurisdiction of English admiralty courts, particularly since the admiralty act of 24 Vict. c. 10. See Parsons, Shipp. 842.

It is easily seen that there is no good reason for drawing the distinction sought to be made. The contract, which is the basis of this action, is indisputably a maritime contract. It relates wholly to ships, cargoes, freights, etc., on navigable waters. If it had been half complied with, not an objection could have been suggested as to our jurisdiction. If the defendants had broken their contract to the extent of one bale of cotton only, we could have amerced them. Are they to escape scot-free by the magnitude of their breach?

In the case of *Watts v. Camors*, lately decided in this court, the owners, for a total breach of a charter-party, filed a libel *in personam* against the charterers, and although the court held the charterers liable, no suggestion of want of jurisdiction was made; and I understand these libels have generally been allowed in this circuit.

The third objection argued is that the contract was executed in Great Britain and is to be construed according to the law of the place of contract, and that under the laws of Great Britain it was not a maritime contract, and the court of admiralty would not have jurisdiction either *in rem* or *in personam*; and cited *The Daunebrog*, 4 Ad. & Ecc. 386.

The restricted jurisdiction of the English admiralty courts has been frequently noticed by our courts, and see act, 24 Vict., called the "Admiralty Court Act."

Justice Bradley says, in 11 Wall., quoted above, that the place where a maritime contract is made does not affect its character, and that our admiralty jurisdiction depends on the nature and effect of the contract.

The other objections are based on the proposition that Maury & Co. had cancelled the contract by their notification to the defendants that they would hold them in damages for non-compliance, and by their refusal to give orders to the *Romulus* after the time for fulfilling the contract had expired. It can hardly be claimed that the persistent demands of Maury for the execution of the contract or damages for non-execution should be construed as a cancellation of the same, and yet that is all this proposition seems to amount to.

The whole fact is that defendants contracted to furnish the libellant a ship of certain character between the fifth and twentieth of

October, 1879. They did not do it, and have no excuse therefor but inconvenience to themselves, and the refusal of libellant to take an earlier or later ship, or a ship not complying with the contract. And in the record is an attempt to prove a custom in England that the clause in the charter-party giving libellant authority to cancel the contract in case no ship arrived by the twentieth of October, really means that libellant waived all damages if the ship did not arrive according to the charter, reserving to himself, if the ship ever did arrive, the privilege of accepting her or not. In other words, the owners had the option of sending the ship or not. If sent in time, the charterer must accept her; if not in time, the charterer might use his option to accept or reject her. And this, the witnesses swear, is necessary to secure mutuality of contract. But the learned proctor for respondents has not argued this defence, either orally or in his brief, and I doubt if he relies on it. In *McAndrew v. Adams*, 27 Eng. C. L. 297, under similar clauses in a charter party, no such custom was urged or considered.

I finally conclude that under all the circumstances of this case, and the authorities presented, I will maintain jurisdiction, and hold the defendants for all damages claimed in the libel and resulting from the failure of defendants to execute their contract. A reference and further proof will be necessary to ascertain such damages. It follows that the cross-libel filed by the defendants for damages growing out of the attachment issued in this case must fall. A decree in accordance herewith will be entered by the clerk; and on the final decree the facts and the conclusions of law will be found as set forth herein.

THE ALABAMA.*

(Circuit Court, E. D. Louisiana. June, 1881.)

1. COLLISION—LIGHTS—TORCH—REV. ST. 4234—NEGLIGENCE ON BOTH SIDES.

Libellants found to be in fault for not having red and green lights properly screened, and for not having a torch or flash-light to show on the bow of their boat when she approached the steam-ship. The steam-ship was in fault for not avoiding the collision, having sighted the smack two miles off. Damages divided.

Action for damages for a collision which occurred in Mobile bay on the fifth of January, 1878, between the sloop-smack Charles Henry and the steam-ship Alabama, both being under way. The defence alleged that the smack did not have a proper watch on deck; did not have her lights properly set and screened; and did not have the torch-light at her bows, as required by the laws of navigation. There was judgment in the district court for libellant for \$1,083.86, and claimants appealed.

Geo. H. Braughn, Chas. F. Buck, Max Dinkelspeil, and J. Ward Gurley, Jr., for libellant.

Emmet D. Craig, for claimant.

PARDEE, C. J. After examining the entire record, I find that the sloop-smack Charles Henry, at the time of the collision with the Alabama, and just prior thereto, was in fault in not having her red and green lights properly guarded and screened; in not having a torch or flash-light to show on her bow when she approached the steamer; and I am somewhat inclined to believe that there was no watch on deck. The failure to screen the red and green lights made it impossible to tell, on board the Alabama, what the course of the Charles Henry was, within some ten points. Her course might be north-east or north-west, and aboard the steamer she would appear to be coming head on. There can be no doubt that the shining of these lights on the Charles Henry confused the pilot of the Alabama, and rendered the collision probable. The evidence, though slightly conflicting, satisfies me that the Charles Henry never changed her course; and, whether her men were below or on watch, it was the duty of the steamer to keep out of her way; it was in the open bay, where there was plenty of room, and the sloop was seen by the quartermasters of the steamer near two miles off. If the sloop had no lights at

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar

all, the steamer should have avoided the collision if her pilots saw the sloop.

The collision was the result of negligence on both crafts; the damages must be divided.

The claimant's proctor pretends that the commissioner's report is all wrong, and that he did not have an opportunity to produce witnesses as to damages. It would seem that \$150 a month for non-use of a smack not worth over \$1,000, is pretty high; such a smack would soon pay for itself, laying up.

Whereupon the court entered a decree reversing the decrees and orders in the district court, holding that the collision was the fault of both vessels; that the damages be divided; and made a reference to a commissioner to examine and report actual damage suffered.

MEMPHIS & ST. LOUIS PACKET CO. v. THE H. C. YAEGER TRANSPORTATION Co.*

(Circuit Court, E. D. Missouri. February 10, 1882.)

1. COLLISION—DIVISION OF DAMAGES.

Where, in case of a collision between two vessels, there is mutual fault, the damages should be equally divided between the owners.

2. SAME—MEASURE OF DAMAGES—REPAIRS—DETENTION.

The damages to be divided in such cases are those necessarily resulting from the collision. If repairs are necessitated their actual cost should be taken into account. If the injured vessel is bound on a voyage and is detained by reason of the collision, the loss from detention also constitutes part of the damages.

In Admiralty. Appeal.

Noble & Orrick, for libellants.

Henderson & Shields, for respondent.

MCCRARY, C. J. This is a case of collision. The court has heretofore affirmed the finding below that there was mutual fault, and that the damages should, therefore, be equally divided between the owners of the two colliding vessels. At the request of counsel a reargument has been had upon the question, whether in such a case demurrage, or charges for loss of the use of the injured vessel while undergoing repairs, should be allowed as part of the damages to be divided.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

Appellant's counsel insists that, both parties being in fault, the only damages to be apportioned are the actual injury to the vessels; or, in other words, the actual cost of repairs. But no case is cited in which it has been so decided, and I think a fair construction of the rule as laid down by the supreme court requires that we give to the word "damages" its ordinary meaning. The leading case in this country upon the subject is that of the *Schooner Catharine v. Dickinson*, 17 How. 170, in which the rule is thus stated: "We think the rule *dividing the loss* the most just and equitable, and as best tending to induce care and vigilance on both sides in navigation." In subsequent cases arising in that court this rule is followed, and subsequently the same language used to express it. It is sometimes said that the damage done to both ships is to be added together and the sum thereof equally divided. But this language is never used in such connection as to lead to the inference that nothing but the actual cost of repairs is to be taken into account. By the word "loss" or "damages" I understand the supreme court to mean the injury directly and necessarily resulting from the collision. If a vessel be bound upon a voyage, and is, by reason of a collision, detained, the loss from detention is a part of the damages resulting from the collision; and if she is disabled by such collision, so that repairs are necessary, the actual cost of such repairs is likewise part of the damages. And in either case such loss or damage is to be paid by the party solely in fault, if the fault be all on one side, or to be divided if the fault be mutual. In both cases the rule as to what is "loss" or "damages" is the same. It is the injury necessarily resulting from the collision. This is the view taken of the rule by *Lowell, J.*, in the case of *The Mary Patten*, 2 Low. 196. The motion for rehearing is overruled, and the order affirming the decree of the district court is adhered to.

THE CENTENNIAL*

(Circuit Court, E. D. Louisiana. June, 1881.)

1. INJURED SEAMAN—WAGES OF, ETC.

In case of injury by fault or neglect of officers, the seaman is entitled to full wages until restored, and reimbursement for keep and medical attendance. But when he is sent to hospital, without expense to himself, no allowance can be made for keep and medical attendance.

2. SAME—PASSAGE HOME.

In such a case, where the seaman is sent to a hospital in a port other than that at which he was shipped, he is entitled to his passage home, or the cost thereof.

In Admiralty.

R. King Cutler, for libellant.

B. Egan, for claimants.

PARDEE, C. J. "In case of injury by fault or neglect of officers, the seaman is entitled to full wages until restored, and for keep and medical attendance." *Desty, Shipp. & Adm.* and cases there cited, § 155.

A careful examination of the evidence filed in the record satisfies me that the libellant came to his injury—a broken leg—while in the performance of his duty, through no fault of his own, but solely from a faulty and dangerous gangway over which libellant and his comrades were ordered to carry coal. The injury was received in the night, at a coaling place, and the evidence is doubtful as to whether proper lights were furnished. It was the duty of the officers of the boat to have provided a safe and proper gangway and suitable lights. Short planks, so placed as to tip and slip, do not make a safe gangway for men to pass over carrying heavy articles of freight or fuel.

Libellant's wages were \$25 per month. The district court allowed six months for restoration, which is short enough for full recovery of a broken leg. As libellant was sent to hospital without expense to himself, no allowance can be made for keep and medical attendance. As libellant shipped at St. Louis and was left here disabled, he is entitled to passage home, amounting to \$12.50, as fixed by the district court. Libellant now asks for an increase of wages on the ground that the recovery has not taken place in the six months allowed, but

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

now, over one year from the injury, there is not complete recovery. I find no evidence in the record on this subject, and therefore can not consider it.

The demand for interest on account of delay through the appeal is better founded. Five per cent. may be allowed, the legal rate in this state. No appeal should have been taken on the evidence submitted below.

Let a decree be entered for \$162.50, with interest at 5 per cent. from January 10, 1880, and for costs in favor of libellant, and against respondents and sureties.

THE GRAND REPUBLIC.

(District Court, S. D. New York. January 28, 1882.)

1. COLLISION—MORTGAGEE AS CO-LIBELLANT—MAY REPRESENT INTEREST OF INSURERS.

The mortgagee of a vessel sunk by a collision is entitled, for the protection of his mortgage interest, to come in on petition as co-libellant in a libel filed by the owners against the offending vessel. He may also represent in such petition the interest of insurers, by their consent, who have paid a part of the loss.

2. ADMIRALTY JURISDICTION—MARINE TORTS.

In such cases the jurisdiction rests upon the maritime tort. The injury to the mortgagee's interest by the destruction of the vessel is an injury recognizable in admiralty; and the marine tort entitles him to relief here, since he could maintain an action of trespass on the case at common law for a similar injury on land.

In Admiralty. Petition for leave to become co-libellants.

Stapler & Wood, for petitioners.

W. H. McDougall, for Martin & Kaskell.

D. & T. McMahon, for the Grand Republic.

BROWN, D. J. On the twenty-second of June, 1880, a libel was filed in the above case by the libellants, as owners of the steam-boat *Adelaide*, for damages from her being sunk in a collision with the *Grand Republic*, on the nineteenth of June, through the alleged fault of the latter. At the time of the loss of the *Adelaide* the present petitioners, the Harlan & Hollingsworth Company, held a mortgage upon the *Adelaide*, on which the sum of \$20,000 was owing. A portion of the loss has been paid to the mortgagees by certain insurance companies, in whose behalf also, as well as for themselves, the

petitioners now ask leave to become co-libellants to recover for the injury to their interest as mortgagees of the vessel sunk by the collision.

The tenth rule of this court provides that "in case of salvage and other causes, civil and maritime, persons entitled to participate in the recovery, but not made parties in the original libel, may, upon petition, be admitted to prosecute as co-libellants, on such terms as the court may deem reasonable."

It is clear that the petitioners, as mortgagees, would be entitled "to participate in the recovery" for the destruction of their interest as mortgagees through the loss of the *Adelaide*. Admiralty courts have jurisdiction in all cases of maritime torts connected with navigation, and this jurisdiction is exercised in favor of all persons who would have a remedy at common law for similar injuries by an action on the case. *Philadelphia W. & B. Co. v. Philadelphia & H. De G. Co.* 23 How. 209, 215. A mortgagee at common law can maintain an action of trespass, or of trespass upon the case, for any injury to his interest as mortgagee, (*Van Pelt v. McGraw*, 4 N. Y. 110; *Manning v. Monaghan*, 23 N. Y. 539;) and whenever such an injury arises through a marine tort, he has, therefore, upon the general principles of admiralty jurisdiction, a right to relief in this court.

"All persons interested in the cause of action may be joined as libellants; in a collision, for instance, the owners of the ship which is injured, the shippers of the goods, and all persons affected by the injury which is the subject of the suit." *Dunlap*, Adm. Pr. 85. The most proper course is to join all such persons in one suit, that the rights of all may be determined in one trial and in one judgment. The petitioners are, therefore, within the provisions of rule 10, above quoted, and the general principles governing the joinder of parties.

There is some ambiguity in the language of the libel, so that it is not certain whether the libellants seek to recover the entire value of the vessel sunk, or only their own interest therein. A special reason, therefore, exists in this case for the joinder of the petitioners for the recovery of the damage to their interest as mortgagees through the same collision.

Objections have been made to the petitioners' right to become co-libellants, upon the ground that admiralty has no jurisdiction to enforce a mortgage lien or to give a mortgagee possession. *Bogart v. The John Jay*, 17 How. 399; *Schuchardt v. The Angelique*, 19 How. 239; *The Sailor Prince*, 1 Ben. 461; *Morgan v. Tapscott*, 5 Ben. 252. These cases, however, are all cases of actions by the mortgagee for the enforcement of his

rights of contract under the mortgage directly against the mortgaged vessel. But it being held that the mortgage of a vessel is not a maritime contract, no other ground of admiralty jurisdiction in these cases existed. The claim of the present petitioners is wholly different. It is for an injury to the petitioners' interest in one vessel inflicted through a marine tort by another vessel. In such cases the admiralty has jurisdiction in favor of the injured party against the offending vessel by reason of the maritime tort; and the petitioners have an interest in the vessel injured which is perfectly recognizable in admiralty, and which is therefore sufficient to entitle them to seek relief for that tort in this tribunal. Where jurisdiction of the *res* in admiralty has already been otherwise acquired in direct proceedings against the mortgaged vessel itself the mortgagee's interest in the *res* is recognized, and he may intervene for the protection of his interest either before or after the sale. *The Old Concord*, 1 Brown, Adm. 270; *Schuchardt v. The Angelique*, 19 How. 239, 241.

The petition shows that the petitioners represent the insurance companies and act by their authority, and they may therefore prosecute in behalf of the insurers, as well as of themselves, for the full amount of the mortgage interest. *Fretz v. Bull*, 12 How. 466, *Monticello v. Mollison*, 17 How. 152, 155; *Garrison v. Memphis Ins. Co.* 19 How. 312; *Hall v. Railroad Cos.* 13 Wall. 367; *Campbell v. The Anchoria*, 9 FED. REP. 840.

The prayer of the petition is therefore granted, and the petitioners may come in as co-libellants upon the usual stipulation for costs.

In re IOWA & MINNESOTA CONSTRUCTION CO.

BOONE and another *v.* IOWA & MINNESOTA CONSTRUCTION Co. and others.

(*Circuit Court, D. Iowa, N. D.* January, 1882.)

1. REMOVAL OF CAUSE—WHO MAY—INTERVENORS.

Where the intervening petition charges fraud, and is not in the nature of a bill, charging errors or irregularities merely, or where it charges want of jurisdiction and want of notice to complainants, and where no attack is made on any final judgment, but only on interlocutory orders, still within the control of the state court, intervenors may remove the cause.

2. SAME—LOCAL PREJUDICE.

Where there has been no final trial or hearing, intervenors may remove the cause on the ground of local prejudice, on compliance with the provisions of the act of congress.

3. SAME—HOW EFFECTED.

The filing of the petition in the state court *ipso facto* removes the cause.

4. SAME—RIGHT OF REMOVAL—RECEIVER.

The petition of intervention is in the nature of a suit for relief as against defendants therein named, and the right of removal is not affected by the fact that a receiver had been appointed by the state court to wind up the affairs of the corporation.

5. SAME—RIGHT OF INTERVENORS.

The right of intervenors to a preliminary injunction to restrain further proceedings until there can be a hearing on the merits, follows as a matter of course.

Motion to Remand.

McCRARY, C. J. That the intervening petition, filed in this case in the state court by George Boone and Francis E. Hinckley, presents a controversy between citizens of Illinois on one side and citizens of Iowa on the other side, is conceded. But it is insisted that the case was, nevertheless, not removable, because the petition of intervention is a supplementary proceeding, so connected with the original proceeding as to form an incident to it, and substantially a continuation of it. To determine whether or not this is so we must look to the record. The proceedings in the state court were instituted in 1875 by a petition presented by L. Schoonover, trustee, alleging that he was a judgment creditor of the said Iowa & Minnesota Construction Company, and stating the names of the stockholders in that corporation, with the sum subscribed by each. He alleged the insolvency of the corporation, and prayed the appointment of a receiver. This

application was set down for hearing at the March term, 1875, and notice to the stockholders was ordered to be served by publication in a newspaper, and by sending the same through the mail. At the said March term, notice having been so given, the said L. Schoonover was appointed receiver, and authorized to dispose of the assets, collect the assessments from stockholders, and to pay the debts. There was no appearance for the stockholders. The court from time to time thereafter ordered assessments upon the stock to be made and collected, and the receiver from time to time reported as to his doings, and the proceedings were still pending and undisposed of in the state court, when, on the seventh day of November, 1881, the said Boone and Hinckley appeared for the first time, and filed therein their petition of intervention, by which they allege in substance that they are, and have ever since the commencement of said proceedings been, residents and citizens of Illinois, and that they have had no notice of said proceedings. They aver that a certain large claim against the corporation, held by one Stacy, for whom the said Schoonover, the receiver, is assignee, is fraudulent; and that the said Schoonover has not defended against it; and that Stacy is in fact largely indebted to the incorporation. Fraud, collusion, and conspiracy are charged; and the prayer is that there may be accounting as between Stacy and the corporation, and that the receiver may be enjoined from proceeding, by suits at law or otherwise, to collect from the intervenors their unpaid stock, and applying the same to the payment of the alleged fraudulent claim of Stacy; also that the order appointing said Schoonover as receiver be set aside. The rule by which we are to be guided in determining whether this is a removable controversy has been settled by repeated adjudications of the supreme court, and is as follows:

"This court cannot entertain jurisdiction to set aside the judgment of a state court for mere irregularity, or in a case where the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, a bill of review, or an appeal; but it has jurisdiction of a bill to set aside a judgment for fraud, or upon the ground that it was rendered by a court having no jurisdiction." *Gaines v. Fuentes*, 92 U. S. 10; *Barron v. Hunton*, 99 U. S. 80.

That the removal of the case is not prohibited by the doctrine announced in these cases is clear for several reasons:

(1) The intervening petition charges fraud, and is, therefore, not in the nature of the bill charging error or irregularities merely. (2) It charges want of jurisdiction, and that the proceedings complained of have been had with-

out notice to complainants. For the purposes of the present motion I suppose this must be taken as true. (3) The intervenors do not attack any final judgment of the state court, but only the interlocutory orders made from time to time, and which, at the time of the intervention, were still within the control of the state court.

Another consideration, however, is still more conclusive of the question. The petition for removal is not based entirely upon the citizenship of the parties. It charges local prejudice, and prays removal upon that ground also. Now, if we consider the proceeding in the state court from the beginning as one suit, and also assume that the intervenors had notice, and were proper parties, still it is clear that there has never been a final trial or hearing, and that, therefore, the petition for removal, upon the ground of local prejudice, is in time, and perfectly good. It may be that, if these assumptions are found upon investigation to be correct, we may be constrained to hold the intervenors bound by some of the orders of which they complain, unless they can successfully attack them for fraud; but, however this may be, the right of removal is clear. We are not called upon, in passing upon that question, to inquire what the ultimate judgment may be upon the issues presented. It is enough that the parties are citizens of different states; that the amount involved exceeds \$500, exclusive of costs; that the proper affidavit of prejudice is filed; and that the cause had not been finally tried or determined when the petition for removal was filed. All these conditions we find fulfilled.

It remains to consider the question whether the intervenors were parties to the suit in the state court at the time they filed their petition and bond for removal. I suppose the theory of the receiver of such creditors as sustain his action is that the intervenors have been parties from the beginning by virtue of the publication of notice or sending thereof through the mails, or both. If this be so, that is the end of controversy on this point; but the intervenors deny this, and assert that they never were parties until they made themselves such by filing their petition of intervention; and upon this theory the counsel for the receiver insist that they had no right to intervene without leave of court, which was not obtained, and that they were, therefore, not parties. The right to intervene, under the Code of Iowa, is given absolutely and without condition to "any person who has an interest in the litigation," whether he be interested in the success of one or the other party to the action, or against both. Code of 1873, § 2683.

The manner of the intervention is provided by the same Code, § 2685, as follows:

"The intervention shall be by petition, which must set forth the facts on which the intervenor rests, *and all the pleadings therein shall be governed by the same principles provided for in this chapter.* But if such petition is filed during the term, the court shall direct the time in which an answer shall be filed thereto."

No action by the court seems to be necessary to an intervention. The party who intervenes appears to have the same right to file his petition of intervention that the original plaintiff had to commence his suit. There is no provision for obtaining leave of court, and as he may file his petition at any time, "either before or after issue has been joined in the cause," it is clear that he may file it during a vacation, and therefore necessarily without leave of court. If filed during term the court shall direct the time in which the answer shall be filed. This is upon the supposition that the adverse parties are present, and are advised of the filing. If filed in vacation there is no provision as to the time of answering, except that it shall be governed by the rules prescribed for pleading in other cases. I think the intervenors correctly construed this provision as authorizing the service of notice to the adverse parties requiring an answer at the next term as in cases of original suits. This ruling is not in conflict with anything to be found in the case of *Barkdull v. Callanan*, 33 Iowa, 391. In that case a petition of intervention was filed in vacation, and the court distinctly say that such filing was "authorized by section 2932 of the Revision," which is the same as section 2685 of the Code of 1873, above quoted. The petition for intervention was afterwards, upon notice, stricken out, and leave to refile was refused. The court say: "We cannot determine the correctness of this ruling, for no exception was taken to it." There was a motion for change of venue, which was overruled; and the court say, properly, "because her petition of intervention had been stricken from the files," and she was, therefore, not a party. The case does not hold that leave of court is necessary to the filing of a petition of intervention, but, on the contrary, holds that such a petition may be filed in vacation, and therefore impliedly holds that it may be done without such leave.

A question is made as to whether it was necessary for intervenors to present their petition for removal to the state court. If this were a new question I should have grave doubts upon it; but it seems to be settled that the filing of a proper petition in the state court *ipso*

facto removes the cause. *Osgood v. R. Co.* 2 Cent. L. J. 273; *Merchants', etc., Bank v. Wheeler*, 13 Blatchf. 218; *Connor v. Scott*, 4 Dill. 242; Article on Removal of Causes, 2 Cent. L. J. 730, and cases cited.

It has been suggested that this proceeding was not a suit in the state court within the meaning of the acts of congress, and therefore not removable. I am, however, of the opinion that the petition of intervention is in its nature a suit wherein the intervenors seek relief as against the defendants therein named, and the right of removal in such a case is not affected by the fact that the state court had appointed a receiver who was proceeding to wind up the affairs of the corporation. *Osgood v. R. Co.* 2 Cent. L. J. 273. If we assume that the subject matter of the controversy was in the possession of the state court, the right of removal still remains, as was distinctly held by the supreme court in *Kern v. Huidekoper*, 103 U. S. 485, (see pp. 490, 491.)

The motion to remand must be overruled.

The question of the right of the intervenors to an injunction to restrain further proceedings until there can be a hearing upon its merits, was not discussed by counsel at the hearing, but I suppose the granting of that application follows as a matter of course. There would be no propriety in our entertaining jurisdiction of the case made by the intervening petition, and refusing to restrain the receiver from disposing of the estate and paying the debts now alleged to be fraudulent. A temporary injunction may therefore issue to restrain the defendant named in the petition of intervention, as therein prayed, until further order of the court, upon the intervenors giving bond with the usual condition, in the sum of \$2,000, with sureties to be approved by the clerk.

BUFORD & Co. v. STROTHER & CONKLIN.

JOHN DERE & Co. v. STROTHER & E. CONKLIN.

BOYD, Adm'r, etc., v. BRADISH and another.

(Circuit Court, D. Iowa. November Term, 1881.)

1. REMOVAL OF CAUSE AFTER JUDGMENT.

Where a supplemental proceeding is a mere mode of execution or relief inseparably connected with the original judgment or decree, it cannot be removed, although some new controversy or issue between plaintiff in the original action and a new party may arise out of the proceeding. But where such proceeding is not a mere mode of execution or relief, but involves an independent controversy with a new or different party, it may be removed into the federal court.

2. SAME—CAUSE, WHEN REMANDED.

Where the plaintiff in a suit in a state court obtained judgment against the defendant, garnished certain parties, and, after taking issue upon the answer of the garnishees, removed the issues thus made to the circuit court of the United States, *held*, on motion by the original defendant and the garnishees to remand the cause, that the motion be maintained, on the ground that the proceedings are a mere mode of execution or relief, inseparably connected with the original judgment.

3. SAME—MOTION TO REMAND, WHEN DENIED.

In an action in the state court against a corporation, incorporated under the laws of the state of Iowa, the plaintiff obtained judgment, and, upon a return of the execution unsatisfied, he proceeded against certain stockholders in the corporation under the provisions of chapter 181, title 9, of the state court, and removed these proceedings into the circuit court of the United States. *Held*, on motion to remand, that the motion be denied, on the ground that such proceedings involve an independent controversy with new parties, against whom the plaintiff seeks to establish a new liability.

Motion to Remand.

Reed & Marsh and Willett & Willett, for the motion.

Martin, Murphy & Lynch and Brown & Wellington, *contra*.

LOVE, D. J. The foregoing cases are now before us upon motions to remand the same to the state courts from which they were brought into this court. The motions to remand are all placed by counsel upon the same general grounds. It is insisted as to each of these cases that it is a proceeding supplemental to the original cause out of which it grew, and being a mere *appendage* to the judgment rendered in the original case it cannot be separated from the same and brought for adjudication here. These several motions may therefore be considered together.

There is no question of jurisdiction in any of these cases, as far as citizenship and the amount involved are concerned.

The first two causes are proceedings by garnishment. The plaintiffs in these cases obtained judgments against the defendants in the state court, caused certain parties to be garnished, and having taken issue upon the answers of the garnishees, the plaintiff removed the issues thus made for determination into this court. The original defendant and the garnishees now move to remand.

In the third case the plaintiff, a citizen of Wisconsin, obtained a judgment in the state court against an Iowa corporation, and having failed to obtain satisfaction of the judgment he seeks by this action to make the present defendants, who are stockholders in the corporation, liable, in pursuance of chapter 181, title 9, of the Code of Iowa. The plaintiff in the present action against the defendants, one of whom is a director and the other a stockholder in the corporation, sets out his judgment and the return of execution *nulla bona*; charges the defendants with certain alleged frauds to his injury within the provisions of the statute; and prays judgment for his damages. The plaintiff caused the proceedings against the stockholders to be removed into this court. The defendants move to remand to the state court.

What is the true principle applicable to this class of removal cases? By what rule or criterion may we determine whether or not a proceeding which is merely auxiliary to the main judgment or decree may be transferred from the state to the federal court? It is idle to say that a supplemental proceeding cannot be removed because it is an appendage or sequence of the original suit. This is, at best, but reasoning in a circle. It is as if one were to affirm that a supplemental proceeding cannot be removed because it is a supplemental proceeding. It is, in fact, substituting one form of words for another form of words. We must, if possible, find some other principle to guide our judgment in such cases. It seems to me that the true principle is this: Where the supplemental proceeding is in its character a mere mode of execution or of relief, inseparably connected with the original judgment or decree, it cannot be removed, notwithstanding the fact that some new controversy or issue between the plaintiff in the original action and a new party may arise out of the proceeding. But where the supplemental proceeding is not merely a mode of execution or relief, but where it, in fact, involves an independent controversy with some new and different party, it may be removed into the federal court; always, of course, assuming that

otherwise the proper jurisdictional facts exist. Every court must, in the nature of things, have the right, as well as the power, to carry its own judgments into execution. To take from any court the prerogative of executing its own judgments by proper process or by supplemental proceedings, when necessary, would be to cripple its jurisdiction in a most essential matter. It would, therefore, be difficult to persuade us that congress meant by the provision in the act of 1875 for the removal of "suits of a civil nature" to authorize the transfer of controversies growing out of mere modes of execution and relief, thus directly interfering with the state courts in the execution of their own judgments. It is not in this sense that the words "suits of a civil nature" are ordinarily used.

Now, the process of garnishment after judgment is clearly a mode of execution. Its purpose is to obtain satisfaction of the judgment out of the debtor's effects which may be in a third person's hands. The garnishment, therefore, is inseparably connected with the judgment. If money is realized it is to be applied to the satisfaction of the judgment. Suppose that an issue, taken upon the garnishee's answer, should be removed to the federal court, (the original case remaining, as it must remain, in the state court,) and suppose the federal court should deliver judgment against the garnishee, and by execution or otherwise the money should be collected, how could the federal court enter satisfaction, the judgment not being under its control? We see in this the embarrassment that must arise from the attempt to separate the garnishment proceeding from the judgment, the latter remaining in one court and the former carried to another and different court.

This branch of the rule is clearly illustrated by the case of *Webler v. Humphreys*, 5 Dillon, 223. The motion in that case was manifestly a mode of execution. The plaintiff had a judgment against a Missouri corporation, and the statute of Missouri provided substantially that upon a return of *nulla bona* the judgment creditor might, by motion, with due notice, obtain an order from the court for execution against a stockholder to an amount equal to the balance of his unpaid stock. Here the unpaid stock is treated as assets belonging to the corporation, and the statute provides the judgment creditor with a mode of execution to reach such assets. It was held by the circuit court for the district of Missouri that the motion could not be transferred from the state to the federal court, notwithstanding the fact that there was a new controversy between the plaintiff and a new and different party.

The other branch of the rule, that there can be no removal where the supplemental proceeding is a mode of *relief* inseparably connected with the original judgment, is illustrated by the case of *Chapman v. Barger*, 4 Dillon, 557. In this case it was held that the proceeding under the occupying claimant law, for the value of improvements after judgment in ejectment, cannot be removed to the federal court. In this class of cases the statute of Iowa provides a mode of relief after judgment for the occupying claimant. Upon the filing of his petition the execution of the original judgment is to be suspended. The value of the improvements is to be ascertained, and also the value of the land aside from the improvements. The plaintiff in the main action may thereupon pay the appraised value of the improvements and take the property. If the plaintiff fail to do this after a reasonable time to be fixed by the court, the defendant may take the property upon paying the value of the land aside from the improvements, etc. Now it is obvious that this relief is inseparably connected with the judgment in the main action. A court not having the judgment in the main action under its control, could not give to the parties the full measure of relief provided by the statute; for supposing the owner of the land should pay for the improvements, he would be entitled to an execution to put him in possession of the property, and a writ of possession could issue only upon the judgment in ejectment.

It is obvious, therefore, that the motion to remand the first two cases above named must be sustained.

As to the third case, it stands upon wholly different ground. The proceeding in this case is not in any sense a mode of execution or relief after judgment. It does not aim to reach assets of the corporation in the hands of a stockholder or director. It seeks no relief which is inseparably connected with the judgment against the corporation. The plaintiff in his petition charges the defendants, as stockholders and directors of the corporation, with certain fraudulent acts and representations within the terms of the 1071st section of the Code of Iowa, and prays judgment for damages as provided for in that section. The section is as follows:

“Intentional fraud, in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities, shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from such fraud may recover damages therefor against those participating in such fraud.”

Here is a distinct and independent cause of action given by the last clause of the section. The plaintiff's allegations are founded upon facts which he claims bring him within the terms of this section. The gravamen of his action is fraud, and he prays judgment for damages. It may have been necessary for him to set out the judgment and show that an execution has been returned unsatisfied, to meet the conditions of the 1083d section, but the judgment is not the foundation of his action. He has a controversy with new parties distinct from that upon which the judgment was rendered. He seeks to establish a new liability against these new parties.

It is further argued by defendant that this action cannot be maintained here because it is in the nature of an action to enforce a statutory penalty. To this the answer is that it is not an action to recover penalties, but unliquidated damages. It is a civil, not a penal action. Its object is not punishment, but indemnity for a civil injury. It is to no purpose to say that the same section of the statutes provides for the punishment of the offence committed by the defendants as a crime. It is not unusual for the same statute thus to provide for indemnity by civil action to the individual injured, and protection to the public by penal action and indictment.

The motion to remand in this case is denied.

NOTE. Proceedings in garnishment process are ancillary to the main suit, and they cannot be removed after judgment. *Pratt v. Albright*, 9 FED. REP. 634.—[ED.]

MARION v. ELLIS.*

(Circuit Court, E. D. Louisiana. February 14, 1882.)

1. JURISDICTION OF CIRCUIT COURTS—TRANSFER OF NEGOTIABLE PAPER TO GIVE JURISDICTION.

Where a citizen of one state transfers mortgage notes held by him to a citizen of another state, or a foreigner, who thereupon, by virtue of his citizenship, brings suit upon the same in a circuit court, the circuit court will take jurisdiction of such a suit, although the transfer was made for the purpose of giving the court jurisdiction, provided such transfer be not accompanied with an agreement to retransfer the property to the grantor after the termination of the litigation. The court, in the absence of such agreement, will not inquire into the motives which induced the transfer.

De Laveaga v. Williams, 5 Sawy. 574, followed.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

PARDEE C. J. When this cause was lately before the court,* it was decided that "the demurrers herein filed will be sustained except so far as the issue of Marion's ownership is concerned, and that will leave the petition or cross-bill substantially a plea to the jurisdiction, on the ground that Marion has been collusively made a party in order to give the court jurisdiction." On this plea to the jurisdiction evidence has been taken and the parties have been heard. The evidence shows that the firm of Grobel & Co., being the holders of the mortgage notes in controversy, pledged them to plaintiff, Marion, to secure the sum of \$250 borrowed money; that the object of Grobel & Co. was to transfer the notes to such a holder as could institute foreclosure proceedings in the United States court; that plaintiff, Marion, loaned the money to Grobel & Co., and took the notes in pledge, without any knowledge of the object of Grobel & Co.; that he only learned the object after the transaction was completed. On this showing the matter is submitted to the court, and the question is whether the transaction is a pure simulation or a veritable contract.

There seems to be no doubt that, as between Marion and Grobel & Co., the arrangement is a binding contract. Marion paid the money over, and has not been repaid. He took the notes in pledge, as he had a right to do. He had no knowledge of the object of Grobel & Co., even if that object would affect the transaction. This conclusion decides the plea adversely, for there can be no doubt that if plaintiff became the pledgee of the notes in good faith, he would have undoubted right to bring suit for foreclosure. See *Armstrongs v. Baldwin*, 13 La. 566; *Garrish v. Hyman*, 29 La. Ann. 28; and see *Giovanovich v. Citizens' Bank*, 26 La. Ann. 15. The citizenship of the parties would give the court jurisdiction.

The case of *Lawrence v. Holmes*, decided at the last term, was a case of simulation; in other words, "there was no actual transfer of the account sued on. The transfer alleged was a pretence."

But it is urged that the friendly relations shown to exist between Marion and Grobel & Co., and the large amount of notes—over \$3,000—given in pledge between friends to secure so small a loan,—\$250—evidences that the transaction, although a contract, was one made to give the court jurisdiction, and it is argued that this is a fraud on the court.

Concede that the contract of transfer was made by both parties with a view to enable suit to be instituted in this court, and still the

*See 9 FED. REP. 369.

plea must fail under the rules laid down in numerous adjudicated cases.

In the case of *De Laveaga v. Williams*, reported in 5 Sawy. 573, Mr. Justice Field said:

"There is no doubt that the sole object of the deed to the complainant was to give this court jurisdiction, and that the grantor has borne, and still bears, the expenses of the suit. But neither of these facts renders the deed inoperative to transfer the title. The defendants are not in a position to question the right of the grantor to give away the property if he chooses to do so. And the court will not, at the suggestion of a stranger to the title, inquire into the motives which induced the grantor to part with his interest. It is sufficient that the instrument executed is valid in law, and that the grantee is of the class entitled under the laws of congress to proceed in the federal courts for the protection of his rights. It is only when the conveyance is executed to give the court jurisdiction, and is accompanied with an agreement to retransfer the property at the request of the grantor upon the termination of the litigation, that the proceeding will be treated as a fraud on the court." See, also, *Briggs v. French*, 2 Sumn. 256; *Smith v. Kernochan*, 7 How. 215; *Barney v. Baltimore*, 6 Wall. 288.

Counsel, by brief, attempt to raise the question that Grobel & Co., being themselves the pledgees of the notes against defendant, had no right to repledge them to plaintiff. To this it may be answered: (1) That is no issue now in the case; (2) the defendant can raise no such issue, it being no concern of his; (3) that so far as it was in this case it has been settled by the ruling on the demurrers lately decided.

The complainant must have judgment on this plea to the jurisdiction. And as the balance of the defendant's petition or cross-bill has been held bad on demurrer, there is nothing left in the case to sustain the outstanding injunction to restrain the sale originally ordered in the premises. Judgment may therefore be also entered dissolving the injunction heretofore issued in this case, with costs, and reserving to complainant his right to proceed on the injunction bond for all damage incurred by reason of said injunction.

Let a decree in accordance herewith be entered.

NOTE. A *bona fide* conveyance of property in controversy for the express purpose of conferring jurisdiction, is no ground for remanding a cause to the state court, (*Hoyt v. Wright*, 4 FED. REP. 168;) but a defendant cannot acquire the right to a removal by the purchase of the interests of his co-defendants. *Temple v. Smith*, 4 FED. REP. 392.—[ED.]

FLAGG and others v. MANHATTAN RY. Co. and others.*

(Circuit Court, S. D. New York. December 21, 1881.)

1. CORPORATIONS—GUARANTY OF DIVIDEND—POWER OF DIRECTORS.

An agreement between two corporations, whereby one guaranties the other a certain specified annual dividend on its capital stock, is not a guaranty to its stockholders severally, but to the corporation, and the power to modify the terms of such guaranty is in the directors of such corporations, not in the stockholders. Where such power is fairly exercised by the directors, in view of all the circumstances, and in good faith, a court will not interfere, even though, on the same facts, it might have arrived at a different conclusion.

In Equity.

S. P. Nash, for plaintiffs.

D. D. Field, for defendants.

BLATCHFORD, C. J. This suit is brought by three persons as individuals and two persons as copartners, who claim to be owners of shares of the capital stock of the Metropolitan Elevated Railway Company, 155, 10, 150, and 75 in number, of the par value of \$100 each, there being 65,000 shares in all. The three companies defendants are railroad corporations organized under the laws of the state of New York, and will be called the Manhattan, the Metropolitan, and the New York. The first company had no lines of railway. The second and third companies had elevated railways in the city of New York. On the twentieth of May, 1879, the three companies entered into a written agreement known as the "triparte" agreement. It recites that the agreement is made "for the purpose of avoiding the danger of crossing elevated railway tracks upon the same level, and otherwise securing to the people of New York the advantages of safer and more rapid transit through the action of one directing body." It provides for the execution of the leases hereinafter mentioned, and contains other provisions which it is not important at this point to notice. On the same day the Metropolitan and the Manhattan executed an agreement of lease in writing. It recites that the Metropolitan is authorized to construct and operate a line of elevated railway in the city of New York, a portion of which, specifying it, is completed and in operation by it, and is engaged in constructing other parts; that the New York is the owner of and engaged in operating certain lines of elevated railway in said city over routes heretofore established by law for it, "which railways and routes at various places unite with the railways and routes" of the Metropolitan, "and

*Reported by S. Nelson White, Esq., of the New York bar.

cross and connect and unite therewith at the same level;" that "the development of the business of passenger traffic on elevated railways in said city has made it necessary for each of said companies to run trains in such manner and with such speed and frequency that the crossing of the trains of one company over and upon the tracks of the other company, and the running of the trains of both companies upon the portions of the track and route jointly owned or used by them, is deemed impracticable except at the risk of inconvenience and delay to the public and danger to human life;" that, "after protracted efforts to devise plans for operating all said lines so as to afford to the public perfect fullness of accommodation and safety, it is the opinion of both companies that such management cannot be assured while the trains of the two companies are run under the control of differing managing officers, or otherwise than by placing the lines of both companies under one sole control, with power to change from time to time the *termini* of routes, to regulate and limit the passage of trains from the tracks of one company upon the tracks of the other at the connecting and crossing points, and to do such other things and make such other changes, from time to time, in the entire management of traffic upon the lines of both railways, as experience may show to be necessary or desirable;" that the Manhattan "is by law authorized to construct and operate elevated railroads in the city of New York, whether owned or leased by it, and is willing and desirous to accept," and the Metropolitan and the New York "have agreed to execute and deliver to it leases of all their respective railways and properties as described in this instrument, and in a similar instrument of even date herewith to be executed by the New York," "as lessor to the Manhattan," "upon all and singular the terms, agreements, and conditions herein and therein mentioned and set forth;" that the Metropolitan "has heretofore executed to the Central Trust Company of New York its first mortgage, bearing date July 10, 1878," "securing the bonds therein provided for, the total amount thereof now issued and agreed to be issued being \$8,500,000 of principal; that the Metropolitan "may be hereafter required" by the Manhattan "to issue further amounts of the said bonds secured by the said mortgage in excess of said \$8,500,000," for the purpose of constructing and equipping extensions of the line of the Metropolitan, "payment of all which bonds, principal and interest, is to be assumed by the Manhattan;" and that the Metropolitan "has issued and agreed to issue its capital stock to the amount, at its par value," of \$6,500,000, upon which stock the Manhattan "has agreed to guar-

anty the payment of a dividend of 10 per cent. per annum as hereinafter provided."

Then, by the agreement, the Metropolitan, "in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained, on the part of the Manhattan," "to be paid, kept, and performed," leases to the Manhattan "all and singular the railroad, or railway, now owned, operated, or constructed by it in the city of New York, as above described, and all and singular the unfinished portions thereof now under construction, together with all its franchises, rights, and privileges relating thereto, or to the construction and operation of its entire railway as authorized, subject to the said mortgage, and to the terms and conditions under which said franchises are held by the company, with all and singular the right, title, estate, and interest which the Metropolitan Company has in any real estate in the city of New York heretofore acquired by it, or which it may hereafter acquire under contracts already made therefor, being all and singular the entire property and estate of said Metropolitan Company, except such of its franchises, rights, and privileges as are or may be necessary to preserve its corporate existence or organization, and its interest in the covenants and conditions of this indenture." The lease is for 999 years from November 1, 1875, or so long as the Manhattan "shall continue to exist as a corporation, and be capable of exercising all the functions herein stipulated on its behalf;" the Manhattan paying to the Metropolitan the yearly rent of \$10,000, payable semi-annually on the first days of January and July, the first payment of \$5,000 to be made July 1, 1879, "and keeping and performing all and singular the covenants and agreements hereinafter set forth to be by the Manhattan" "kept and performed." The Manhattan assumes and agrees to pay, as they respectively become due, the principal and interest of the said recited first-mortgage bonds of the Metropolitan, and keep it harmless from all claims against it arising from all or any of said bonds. Then follows this article:

"Art. 2. The Manhattan Company guaranties to the Metropolitan Company an annual dividend of 10 per cent. on the capital stock of the Metropolitan Company, to the amount of \$6,500,000; that is to say, the Manhattan Company will, each and every year during the term hereby granted, beginning with the first day of October, 1879, pay to the Metropolitan Company \$650,000, free of all taxes, in equal quarterly payments of \$162,500 each, on the first days of January, April, July, and October, in each year, the first of such payments to be made on the first day of January, 1880, and the Manhattan Company will, from time to time, execute

in proper form a guaranty to the above effect, printed or engraved upon the certificates of stock of the Metropolitan Company, and, as such stock certificates are surrendered for cancellation and reissue, will, from time to time, at the request of the holder, renew such guaranty upon all reissued certificates."

It is then provided that the portions of the railway of the Metropolitan which were completed on the thirty-first of January, 1879, shall be deemed to have been operated from the close of business hours on that day by the Manhattan, and all such operation from and after that time shall be for the account of the Manhattan; that the Manhattan shall run the railways, and keep them in repair and working order, and supplied with rolling stock and equipment; that, "in addition to the rental hereinabove provided," it shall pay all taxes, assessments, duties, imposts, dues, and charges which shall become payable by the Metropolitan, or be imposed on the leased property, or its business, earnings, or income; that the Manhattan will save harmless the Metropolitan against all expenses of operating the railways, and all claims and suits for injuries to persons and property, or for causing the death of any person, or for any other thing in the operation or management of the leased property, or for any breach of contract by the Manhattan in carrying on the business, and will defend all suits and claims brought against the Metropolitan in respect of any matter arising out of the management or operation of said railways since January 31, 1879, and that, in case the Manhattan shall at any time fail to pay in full said cash rental, "or the guarantied dividend aforesaid, as the same shall become payable, or fail or omit to keep and perform the covenants and agreements herein contained, or any of them, and continue in default in respect to the performance of such covenant or agreement, or payments, for the period of 90 days," the Metropolitan may enter on the leased railways and premises, and thenceforth hold, possess, and enjoy them as of its former estate, and, upon such entry, the interest of the Manhattan therein shall cease. The Manhattan then agrees with the Metropolitan that it will execute, acknowledge, and deliver "any and all instruments for the more effectually assuring unto the Metropolitan" "the payment of the cash rental and dividends hereinbefore reserved or agreed to be paid." On the same twentieth of May, 1879, an agreement of lease, in writing, was executed by the Manhattan and the New York, in like terms, in all respects, *mutatis mutandis*, with the one between the Manhattan and the Metropolitan.

Under these agreements of lease the Manhattan proceeded to operate the railways of the other two companies. On the second of July,

1881, the people of the state of New York brought a suit in the supreme court of New York, against the Manhattan, the complaint in which sets forth the fact of said leases, and the operation of the roads under them by the Manhattan; that by their terms it agreed to pay outstanding obligations of the other two companies amounting to very large sums, and, under them, is now liable for the payment of bonds of said companies, amounting in the aggregate to about \$21,000,000, and the interest thereupon, and for the payment of all taxes on said roads, and to pay to said companies certain additional fixed charges created by said leases, and which aggregate more than \$1,300,000 per annum; that the Manhattan is, and for a long time has been, operating said railroads at a great loss, which loss for the year ending September 30, 1880, was, according to the estimates, about \$500,000; that the continued operation of said road by it will result in further loss to it; that it owes, and for a long time past has owed, a sum exceeding \$900,000 for taxes unpaid, a large part of which has been due for more than one year; that it has no assets with which to meet its existing indebtedness, and the requirements of said leases, except the receipts which accrue to it, from time to time, from said roads, which fall short of its annually-accruing obligations to the amount of at least \$1,000,000 per annum; and that, on or about April 25, 1881, it addressed a communication in writing to the mayor, comptroller, and corporation counsel of the city of New York, whereby it declared itself to be unable to defray its obligations, especially its indebtedness for taxes, and in substance declared itself insolvent and showed it had been so for more than a year. The complaint prayed a dissolution of the incorporation of the Manhattan, and a forfeiture of its corporate rights, privileges, and franchises, and the appointment of a receiver of its property, and of a temporary receiver. On the twelfth of July, 1881, the Manhattan answered the complaint, denying its insolvency, admitting that during the year ending September 30, 1880, the said roads were operated by it at a loss, and that, on or about the twenty-fifth of April, 1881, it addressed a communication in writing to the mayor, comptroller, and corporation counsel of the city of New York, and denying the other material allegations of the complaint. On the thirteenth of July, 1881, the supreme court, by Mr. Justice Westbrook, after a hearing of both parties, appointed John F. Dillon and Amos L. Hopkins to be temporary receivers of the Manhattan. On the twenty-third of July, 1881, the New York presented to the supreme court a petition

v.10,no.4—27

in said suit, praying that the Manhattan and the receivers be directed to deliver over to the New York its railways and other property. The petition alleges that the Manhattan owes the New York for gross rental, dividend rental, and interest on mortgage bonds \$465,000 and has not paid the taxes assessed on the New York for 1879 and 1880; that the New York owes no debts except its first-mortgage bonds to the amount of \$8,500,000, and claims for damages and taxes which the Manhattan is bound to pay, and has a considerable cash surplus on hand; that the Metropolitan owes first-mortgage bonds to the amount of \$10,818,000, and second-mortgage bonds to the amount of \$2,000,000; that the net earnings of the railways of the New York for the last two years have been more than enough to pay the interest on its bonds and dividends of at least 10 per cent. to its shareholders, but the net earnings of the railways of the Metropolitan have been barely enough to pay the interest on its bonds; that the dividend rental paid to the Metropolitan for the six months prior to July, 1881, has been paid out of the earnings of the New York; that the indebtedness of the Manhattan to the New York is increasing every day, and the railways of the New York and the Metropolitan are now run at the expense and risk of the New York; that the structures and rolling stock of the New York and the Metropolitan have not been kept up to the standard required by the tripartite agreement and the leases, and the falling off in this respect has been greater on the New York railways than on the Metropolitan; that the Manhattan has kept up the structures and rolling stock of the Metropolitan better than it has kept up those of the New York; that a considerable number of the engines of the New York have been sold by the Manhattan, which has neither replaced the same nor paid the proceeds to the New York; and that the New York, if it got back its railways in their present condition, would have to pay a large sum to replace its rolling stock and structures in the state in which the Manhattan took them. This petition was brought to a hearing before Mr. Justice Westbrook on the fourteenth of September. No decision on it being made, the New York, on the thirtieth of September, presented a supplemental petition, praying the same relief, and setting forth that since the default of the Manhattan in not paying to the New York the various sums of money which were due on July 22d, 90 days have elapsed, the last day of the 90 being September 29th; that none of said moneys have been paid except \$50,000, paid before the former petition was brought; that on the twenty-ninth of September the New York demanded of the Manhattan and of its receiv-

ers payment of said sums, but they were not paid; that by reason thereof a forfeiture of said leasehold estate has accrued to the New York, and that it is entitled to the possession thereof. This supplemental petition was brought before the court on the third of October, and, after hearing the plaintiffs in the suit and the receivers, and the New York, the Metropolitan, and the Manhattan, an order was made giving leave to the Manhattan and the Metropolitan to answer on or before October 5th, and directing that the supplemental petition be considered as part of the original petition.

On the eighth of October, 1881, the receivers put in an answer to the petition of the New York, and the Manhattan put in an answer to it similar to the answer of the receivers. The answer sets up that on or about August 31, 1881, one Watson brought a suit in this court, by leave of the said supreme court, in behalf of himself and all other stockholders of the Manhattan, against the New York and the Metropolitan and the receivers, by filing a bill of complaint and serving process on the defendants, the same being what is known as a stockholders' suit, and, in substance and effect, a suit by the Manhattan against the New York and the Metropolitan to have judicially determined whether the New York and also the Metropolitan are not indebted to the Manhattan each in the sum of \$6,500,000, the bill alleging an indebtedness of the New York to the Manhattan of \$6,500,000 and seeking to enforce such liability, and praying an accounting of the operations of the lease from the New York, and that the New York be decreed to pay to the Manhattan or to the receivers such sum as may be found due; that the legal rights and equities of the New York and the Manhattan are necessarily involved in said suit, and the supreme court ought to leave the rights of the parties to be determined therein on issues regularly made and tried on proof; that the supreme court should not, as a court of equity, enforce the forfeiture asked, but leave the New York, by ejectment or other remedy at law, to recover possession of the property; that there are \$13,000,000 of Manhattan stock outstanding in the hands of numerous and scattered holders; that the effect of granting an order of forfeiture will be to destroy the value of such stock beyond repair; that on the last day of September an injunction order was in force, granted by Mr. Justice Westbrook, in said suit, restraining the Manhattan and its officers from interfering in any way in the business of the Manhattan; that the three companies are, and were on the thirtieth of September, by an injunction issued in a suit in this court, each of them enjoined from paying any taxes imposed on the capital

stock and personal property of any one of them by the city of New York for the year 1880; that the New York, in a suit brought by it in July, 1881, against the Manhattan and the Metropolitan, obtained an injunction order restraining the Manhattan from parting with any moneys then in the possession or under the control of the Manhattan, which had been or might be received by it from traffic on any of the railways of the New York, except as required strictly for the operation of the railways of the New York leased to the Manhattan, which injunction was in force on the last day of September; that the Manhattan is not in default for not paying taxes assessed on the New York for the years 1879 and 1880; that as to the remainder of the taxes assessed on the New York, the Manhattan, because the taxes were excessive, unequal, and illegal, determined, with the concurrent consent of the New York and the Metropolitan, that payment of them should be refused and proceedings be taken to review such unlawful taxation, and such proceedings were taken and are pending in the name and at the request of the New York to contest the legality of said taxes and the obligation of the Manhattan to pay them; that the alleged default of the Manhattan in not paying the taxes assessed upon the New York in the years 1879 and 1880 was in accordance with the express instructions of the New York to that effect, and the action of the Manhattan in relation thereto was essential to the protection of the rights of the companies parties to the tripartite agreement, and of the stockholders of each of said companies; and that on or about the first of October, 1881, the New York and the Metropolitan demanded of the receivers the payment of rent alleged to be due to them respectively from the Manhattan under said leases.

Mr. Justice Westbrook rendered a decision on the petition of the New York, at a date stated in the bill in this suit to have been on or about the fourteenth of October, 1881. The decision refers to the fact that in the tripartite agreement the Manhattan agrees to issue and deliver to the New York and the Metropolitan its two bonds, each for \$6,500,000, payable on demand,—one to a trustee for the stockholders of the New York, and the other to a trustee for the stockholders of the Metropolitan, with authority to the trustees respectively to use the same, if they see fit, in payment for the stock of the Manhattan at par; and that the said bonds were executed and exchanged for stock in the Manhattan, so that the New York and the Metropolitan, or their stockholders, became the owners of the entire capital stock of the Manhattan, then amounting to \$13,000,000. Mr. Justice Westbrook held that the mere appointment of the receivers did not terminate the

lease, nor did the insolvency of the Manhattan, if it were insolvent; that the court had no power to settle the questions involved summarily, or otherwise than in an action regularly instituted by the New York to recover the property; that the failure to pay the taxes did not forfeit the lease, because the New York had approved the non-payment, and because there was a proper question as to the lawfulness of the taxes not paid; and that the testimony as to a breach of the lease by not keeping the road of the York in repair was conflicting. As to the default for 90 days in paying the rent, the judge remarked that the New York had obtained the said injunction against the Manhattan, and could not enforce a forfeiture arising from the non-payment of money, when it had itself enjoined the Manhattan from using the principal part of its revenue for any such purpose. The judge then proceeds to say:

"Waiving, however, this point, there is another of great importance also made by said answers of the Manhattan Company and the receivers, which will now be stated. It will be remembered that the capital stock of the Manhattan Company is \$13,000,000. This entire stock was transferred and given to the New York Company and the Metropolitan Company in professed payment of the leases made to the Manhattan Company—\$6,500,000 to each. It is true, this was not directly done, for the form was the execution of two bonds by the Manhattan Company of \$6,500,000 each,—the one to a trustee for the benefit of the New York Company, and the other to a trustee for the benefit of the Metropolitan,—which bonds were exchangeable for the stock of the Manhattan Company at par, and such exchange was immediately made. The directors of the Manhattan Company were persons who were directors of the other two companies. By the terms of the lease the Manhattan Company was to pay the bonded debt of the other companies, with the interest, and also an annual dividend of 10 per cent. on the capital stock of the lessor companies, in quarter-yearly payments. The plain effect of this transaction is manifest. The lessor companies being the owners of the stock of the lessee company, and their directors being its directors, the individuals owning the stock of the former really agreed with themselves to pay themselves a large and liberal rental for the use by themselves of their own property. This was the real transaction, but, as individuals were concealed under the cloak of corporations, the apparent transaction, which alone the general public would be apt to see, was a leasing from two independent corporate bodies to a third equally independent. Such leasing, however, was at a rental which, if the estimates of the earning capacity of the leased roads, submitted upon this motion by the petitioner to prove the bankruptcy of the tenant company, are accurate, it was impossible for such company to pay. The individuals who had thus extracted the life from the lessee company by the provision for the payment to themselves of liberal dividends and the absorption of its entire stock, proceeded to divide and did divide such stock among themselves, and then disposed of it to the general public, thus shifting the burden of paying rent from

themselves to others, and actually receiving from such strangers to the original transaction large sums for the privilege of assuming burdens they could not discharge, and which could only result in the restoration to them of the property leased, and the absolute loss by the buyers of Manhattan stock of their whole purchase price. To recover payment for this stock from the two lessor companies an action is now pending in the United States circuit court for the southern district of New York, brought by John C. Watson, a stockholder of the Manhattan Company, to which suit, by permission of this court, the receivers appointed in this action are parties. The existence of this action, and the grave questions which it presents, are urged both by the Manhattan Company and the receivers as reasons why, in advance of the determination thereof, this court should not surrender the property it holds by its receivers. It would, perhaps, be improper to express an opinion upon the merits of this action further than to say that it presents reasonable grounds for judicial inquiry. As a rule, stock purchased of a corporation must be paid for either in cash or its equivalent, and, if not so paid for, the money which it represents can be recovered. The answer of the petitioning company is, of course, that the stock was paid for by the lease which it gave. Whether, however, this was a *bona fide* exchange of a substantial thing which the law can treat and regard as a payment for the stock transferred, or the contrary, is the point which that suit presents. Leaving out of view the very grave questions of the power of the lessor companies to lease its roads, and of the lessor company to accept them,—which is not considered, because not presented nor argued, but which leases, if illegal, because *ultra vires*, would leave the stock of the Manhattan Company entirely unpaid for,—is it not most apparent that the innocent holders and purchasers of the stock of the Manhattan Company have grave questions to submit to the courts, both as against the lessor companies and also their stockholders, who placed the Manhattan stock upon the market to their great injury? It is enough for present purposes, without passing directly upon the merits of the Watson suit, to say that that which is unjust is unlawful, and for every unlawful act done to another to his injury the law affords a remedy. Whether any of the apparently bald facts which have been mentioned can be explained so as to give them a different color, is a question for the trial. As they appear upon this motion to me, it is plain that they should not be ignored, and the property asked for surrendered upon the ground of the non-payment of obligations incurred by the lease, when, perhaps, a trial of the action pending may determine that the Manhattan Company is not a debtor to, but a creditor of, the petitioner."

After thus reaching a conclusion on the merits adverse to the relief sought, the judge held that, as the application was one addressed to the discretion of the court, and as it involved grave and difficult questions of law and fact, it ought to be disposed of by an action, and not by a motion. He added:

"To the general objection of deciding such grave questions as this application involves so summarily is added one growing out of the tripartite agreement hereinbefore detailed. A sort of *quasi* partnership was thereby formed

between the three contracting parties. The Metropolitan Company joins its objections to those of the Manhattan Company, and protests against the granting of the petition, and claims the right to be heard by a formal suit upon the issues which have been presented. Their request is reasonable, and the relief asked for must be denied upon the ground of discretion, also, without prejudice, however, to the right of petitioner to bring an action against the receivers, leave to do which will be granted."

The portions of the tripartite agreement thus referred to as forming a sort of *quasi* partnership are a provision providing for building certain parts of the railway structures at the joint expense of the New York and the Metropolitan, and a provision (article 14) that whenever, in any fiscal year, the Manhattan shall elect to declare a dividend of more than 10 per cent. on its capital stock, the Manhattan shall pay to the New York and the Metropolitan a sum sufficient to enable them to pay as large a dividend in excess of 10 per cent. on the stock of the New York and the Metropolitan as shall be declared on the stock of the Manhattan, in connection with the other provisions of that agreement.

Such was the condition of the litigation between or affecting the three companies, so far as it is material to refer to it, when, on the twenty-second of October, 1881, the agreement in writing was made between them, out of which the present suit arises. It sets forth, as part of it, copies of the tripartite agreement and of the two leases. It then recites that possession of the railways and property leased was delivered to the Manhattan, and it continued in the possession and operation thereof until July 14, 1881, when possession thereof was delivered to said receivers, who are still in possession thereof, operating them; that "it has been found impracticable to carry out the various terms and conditions imposed by said agreement and leases on the Manhattan;" that the interests of each of the parties, as well as the interest of the public, still require that the lines of railway shall continue to be operated under a single management, and that the parties, "for the purpose of settling all the matters and differences between them, and for continuing the operation of said properties and railways by a single management," have agreed to modify the said agreement and leases as hereinafter set forth. It then provides as follows:

First. The Manhattan shall continue to possess and operate the properties and railways for the period and on the terms agreed in the leases, except as "herein" modified or changed, such possession to commence as soon as the properties can be obtained from the receivers.

Second. The Manhattan, from moneys received by it on acquiring posses-

sion of the properties, and all moneys thereafter acquired by it from the operation of them, after the payment of operating expenses, and of all lawful taxes and assessments against either of the parties or its property, and before paying the sums mentioned in clause 3, shall pay: (1) To the New York all sums of money due and owing to it, under the terms of the lease from it, on the first of July, 1881. (2) To the Metropolitan in the same manner, and out of said moneys, the interest due on its bonds, as provided in the lease from it, from the first of January, 1881.

Third. After making the payments provided for by clause 2, all moneys received by the Manhattan from the operation of the properties shall be used by the Manhattan: (1) For the payment of operating expenses and maintenance of structures and equipment. (2) For the payment of all taxes and assessments lawfully imposed upon either of the parties, or its properties, or the income therefrom. (3) For the payment of the interest on the bonds of the New York and Metropolitan. (4) For the payment to each of them of the rental of \$10,000 per annum, as set forth in the leases. (5) The Manhattan shall pay to the New York annually, during the continuance of the leases, a sum of money equal to 6 per cent. per annum on the amount of the present capital stock, to-wit, \$6,500,000 of the New York, in equal quarterly payments of \$97,500, on the first days of January, April, July, and October; the first to be made January 1, 1882. (6) The Manhattan shall pay to the Metropolitan annually, during the continuance of the leases, a sum of money equal to 6 per cent. per annum on the amount of the capital stock of the Metropolitan, in equal quarter-yearly payments, on the first days of January, April, July, and October; the first to be made January 1, 1882. (7) The several payments enumerated in the foregoing six subdivisions of clause 3 shall be made, and shall have preference over one another, in the order so enumerated, and all moneys received by the Manhattan from the operation of the properties, after making said payments, shall be the property of the Manhattan, and shall be retained by it for its own use and benefit, subject to the covenants "herein" contained, and to unmodified covenants of the leases. (8) The sums provided to be paid by subdivisions 5 and 6 of clause 3 shall only be payable out of the moneys received by the Manhattan from the operation of the properties prior to the dates respectively at which said payments by the terms of the agreement become due.

Fourth. The provisions of the tripartite agreement and the leases are modified so as to conform to "the provisions of this agreement," and the New York and the Metropolitan release the Manhattan from all agreements to pay to the New York and the Metropolitan, or either of them, "the sum or sums of money as is particularly provided in" article 14 of the tripartite agreement and article 2 of the leases.

There is also a clause whereby each of the parties releases the others, and each of them, "of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims, and demands whatever, whether in law or in equity, against either of the other parties hereto, except such as are em-

braced in and created by the terms of said agreement and leases, as modified, and the terms and provisions of this agreement." By a supplemental agreement of the same date, executed by the three parties, it was further agreed that the Manhattan will pay to the New York all sums due and owing to it under its lease to the Manhattan, up to and including October 1, 1881, and that the Manhattan will pay the New York the sum of 6 per cent. on its present capital stock "in the manner and at the times stated in the foregoing agreement, and the payment thereof shall be cumulative, notwithstanding any provision in the eighth subdivision of the third clause thereof."

The bill in this suit is brought by the plaintiffs in their own behalf, and in behalf of all others, shareholders in the Metropolitan, similarly situated with the plaintiff, who may come in and contribute to the expenses of the action, and consent to be bound by the decree herein. It alleges that immediately after the execution of the tripartite agreement and the leases, and the delivery of its road to the Manhattan, the Metropolitan, in order to secure to its shareholders the benefit of article 2 of the lease, and in order to enhance the value of the shares of said stock, caused to be printed on the stock certificates of the Metropolitan the following memorandum: "The Manhattan Railway Company, for value received, has agreed to pay to the Metropolitan Elevated Railway Company an amount equal to 10 per cent. per annum on the capital stock of the latter company,—that is to say, on \$6,500,000, payable quarterly, commencing January 1, 1880;" that the capital stock of the Metropolitan then was, and still is, \$6,500,000, divided into 65,000 shares of the par value of \$100 each; that all the certificates of said shares issued by the company after the execution and delivery of the tripartite agreement and leases were issued with said memorandum printed thereon; that the said shares were largely dealt in in the city of New York, and were bought and sold as stock, upon which an annual dividend of 10 per cent. was guarantied by the Manhattan, and as, upon the sale and transfer, from time to time, of shares of said stock, certificates were surrendered for cancellation and reissue, the Metropolitan issued new certificates containing the same memorandum, and no shares were dealt in after January, 1880, which did not contain said memorandum; that during the year 1880 the Manhattan paid to the Metropolitan quarterly, and the holders of shares of the Metropolitan received, the said dividends so "guarantied," and said dividends were also paid in January and April, 1881, but thereafter the Manhattan made default in the payment of the dividend due July 1, 1881, and has hitherto continued

in default; and that each of the plaintiffs purchased his stock as stock upon which a dividend of 10 per cent. was guarantied by the Manhattan, and with knowledge of the general provisions of the tripartite agreement and the leases, and the certificates issued to the plaintiffs by the Metropolitan having each of them on it the said memorandum.

The bill recites the appointment of the receivers, and alleges that on or about the twenty-fifth of October, 1881, by order of the court, the property was surrendered by the receiver to the Manhattan, and the receivership was vacated. It sets forth the fact of the application of the New York for the restoration of its property and of its denial, and the making of the agreement of October 22d. It alleges that the suit brought on behalf of the people was not ended until about November 17th; that there has been no material change in the alleged insolvent condition of the Manhattan which made the receivership proper, other than such as may result from the execution of the agreement of October 22d; that, during the receivership, negotiations were entered upon between some of the officers of the three companies looking to a modification of the terms of the tripartite agreement and the leases; and that, during the pendency of said negotiations, it was given out, and the plaintiffs expected that the terms of any arrangement which should be concurred in by the officers negotiating on behalf of the several companies would be submitted to the shareholders for approval, but the plaintiffs have never been consulted in respect to said proposed agreement, and have never consented thereto, and have only been able to ascertain the terms of the same with considerable difficulty.

The bill further alleges that, by the agreement of October 22d, the officers of the Metropolitan have undertaken to subordinate the rights and the position of the Metropolitan to the New York, especially by releasing all claims to the dividends accruing July 1st and October 1st, amounting to \$325,000, whereas the same amount due to the New York is to be paid, and, in reference to future dividends, by waiving altogether the guaranty of the Manhattan, and making the dividends payable to the Metropolitan payable only after the dividends to the New York shall have been first paid, and out of any surplus earnings that may be left; that, in the supplemental agreement of the same date, the rights and position of the Metropolitan were further subordinated to the New York, in that the dividends agreed to be paid to the New York were to be cumulative, while those due to the Metropolitan could never be paid out of any earnings, however

large, received after the date of the accruing of the dividend; that the officers of the Metropolitan, who have actively labored to consummate said arrangement, have betrayed its true interests, and the rights and interests of its shareholders, influenced thereto by corrupt motives, and by personal interest hostile to their position and duties as its directors; that at an election of directors held in July, 1881, Russell Sage and Jay Gould became for the first time directors of the Metropolitan; that the Manhattan being shortly thereafter, and on or about July 13th, placed in the hands of receivers, its shares became very much depressed in value, and in August following sold as low as \$16 per share; that thereupon said Gould, being a director of the Metropolitan, began purchasing shares in the Manhattan, and on October 8th had standing in his own name, on the books of the Manhattan, 20,000 shares; that 1,000 shares then stood in the name of the son, George J. Gould, 1,100 shares in the name of W. E. Connor, and 12,400 shares in the name of W. E. Connor & Co., who have heretofore acted as the brokers of said Gould in the purchase and sale of stock, and in which firm said Gould is a partner; that said 14,500 shares belong to or are held in the interest of said Gould; that when said agreement was made he had invested in the stock of the Manhattan over \$500,000; that said Sage, a director and the president of the Metropolitan, is largely interested in the stock of the Manhattan, though his name appears on its stock register as the holder of only 100 shares; that said Gould is in his own name the largest holder of stock in the Manhattan, substantially all of which he has acquired since he became a director of the Metropolitan; that he, together with said Sage, took an active and the principal part in the negotiations which led to the agreement of October 22d; that the negotiations on the part of the New York were conducted by its president, Cyrus W. Field; that though he holds, as appears by the stock register of the Manhattan, only 100 shares of its stock, he has become largely interested in the Manhattan, and began to purchase shares of it as soon as it seemed probable said agreement would be executed and in view of its being carried into effect; that said Sage, who, as president of the Metropolitan, executed said agreements of October 22d, and said Gould, who actively influenced their execution, were, from their fiduciary position, disqualified from executing the same without the consent of the shareholders of the company they represented, and that the same were executed corruptly, for the personal ends of the signers of the same.

The bill further alleges that the Metropolitan, on or about November 1, 1879, executed a mortgage on their line and property, second and subordinate to the mortgage referred to in the tripartite agreement, for the purpose of raising funds to complete and improve the unfinished lines, as provided in said agreement, such second mortgage being made to secure \$4,600,000 of bonds; that only \$2,000,000 thereof had been issued and negotiated at the time of said receivership; that now the Metropolitan has proposed to issue the residue of the bonds provided for in said second mortgage, and to deliver them for negotiation to the Manhattan, and allow it to receive and use the proceeds of the bonds. It also alleges that the Metropolitan, being now in the control of the directors who concurred in the execution of the modified agreement, is shaping its action so as to compel dissentient shareholders to acquiesce in the terms of said agreement, it having stamped as cancelled the guaranty printed on its stock certificates, and, upon a transfer of any certificate containing the guaranty, refusing to issue to the transferee a similar certificate, or any other than a certificate with the guaranty cancelled; that, in aid of this scheme, they, immediately after the execution of said agreement, closed the transfer books of the company; and that the acts and doings of the company, under the management of its present directors, are in hostility to the true interests of the shareholders, and planned in order, through the operation of the market and the customs of the stock exchange, to deprive dissentient shareholders of their just and equitable rights.

The prayer of the bill is:

(1) For a decree that the two agreements dated October 22d are null and void and inoperative as against the plaintiffs; (2) that the Manhattan be perpetually enjoined from performing the same, so far as they change or undertake to change the terms of the tripartite agreement and the leases; (3) that the Metropolitan be enjoined, until the further order of the court, from delivering any of its money or property to the Manhattan, or from issuing to it any of its mortgage bonds for negotiation, or from allowing it to receive the proceeds of any such bonds, or from changing the form of the stock certificates of the Metropolitan, in respect to the matters printed thereon, or doing any other acts which, in respect to the dealings in said shares, or the terms of said certificates, or their registration, shall modify, impair, or embarrass any holders of the certificates having the said memorandum printed thereon; (4) that the Manhattan be enjoined from paying or transferring to the New York any moneys or shares in action under the agreement of October 22d, and from performing any part of the agreement of that date, so far as they change, or undertake to change, the terms of the tripartite agreement and the leases.

The bill is not signed or verified by any of the plaintiffs. It is signed by the plaintiffs' solicitors, and the affidavit of one of them is appended to it to the effect that he has read the bill; that the facts therein stated are true to the best of his knowledge and belief; that the ownership by the plaintiffs of the shares of stock, as alleged, has been stated by them in petitions signed for the purpose of being admitted to the benefit of the suit of Gillett against the same defendants; and that the reason why such verification is not made by the plaintiffs is their absence from the state. Those petitions are not brought before this court.

The two agreements of October 22d are signed by the New York, by said Field, as president; by the Metropolitan, by said Sage, as president; and by the Manhattan, by R. M. Gallaway, as president.

The plaintiffs now move for a preliminary injunction to the purport prayed in the bill. The motion is supported and opposed by affidavits. The facts hereinbefore set forth are free from dispute. The bill is brought by the plaintiffs in their own behalf, and in behalf of all others, shareholders in the Metropolitan, similarly situated with the plaintiffs, who may come in and contribute to the expenses of this suit and consent to be bound by the decree herein. A holder of 50 shares of the stock, bought in February, 1881, makes oath that he bought them with the knowledge of, and in reliance on, the guaranty of the Manhattan, and knowing that he had an interest in the earnings of the Manhattan after the payment of the guaranty to the leased lines and dividends on the Manhattan stock. A holder of 148 shares of the stock, bought in 1880, makes oath that the inducement to him to purchase it was the said guaranty and the positions of equality of the New York and the Metropolitan, and that the action of the directors of the Metropolitan in reducing the dividend on said stock was without his consent, and is a great damage to him, and is illegal and void. These affidavits may be regarded, perhaps, as supplying the defect in the verification of the bill.

1. The principal ground urged in support of the motion is that the agreements of October 22d impair vested rights of the stockholders of the Metropolitan; that each stockholder has for himself such vested rights, and that these rights cannot be impaired as to him without his consent. It is urged that after the Metropolitan lease was executed there was no property left to it upon which anything in the nature of a dividend-paying stock could be based, except the revenue to be derived from the terms of the lease; that the value of the capital stock consisted wholly in such revenue; that the \$162,500 to be paid

quarterly to the Metropolitan was the only profit which investors in the stock could hope to realize from their investment; that the stock is stock of a special character, entitled to an agreed portion of a rental to be paid by the Manhattan; that the agreement of the Manhattan is truly expressed in the memorandum on the certificates; that, by the whole transaction, the Metropolitan agrees to distribute such portion of the rental as a dividend among its stockholders; that the Metropolitan, therefore, cannot surrender the guaranty of the Manhattan; that such guaranty must be regarded as a promise to the Metropolitan for the benefit of its stockholders; and that they are entitled to prevent the Metropolitan from diverting the fund or impairing the contract out of which the right to it comes.

It is undoubtedly true that the object of the provisions of the lease in regard to the 10 per cent. per annum on \$6,500,000, to be paid by the Manhattan to the Metropolitan, was to enable the stockholders of the Metropolitan to have, if possible, during the continuance of the lease, a quarterly dividend of $2\frac{1}{2}$ per cent. on their stock. But I fail to see any contract to that effect between the Manhattan and the individual stockholders of the Metropolitan, or between such stockholders and the Metropolitan. The language of article 2 of the lease is that the Manhattan guaranties to the Metropolitan an annual dividend of 10 per cent. on the capital stock of the Metropolitan to the amount of \$6,500,000; "that is to say," the guaranty is to the Metropolitan, not to its stockholders severally. The article then goes on to interpret the guaranty, and to show what it is, and at what times payments under it are to be made. It says, "that is to say," the Manhattan will, each and every year during the term beginning with October 1, 1879, pay to the Metropolitan \$650,000, free of all taxes, in equal quarterly payments of \$162,500 each, on the first days of January, April, July, and October in each year, the first to be made January 1, 1880. There is no agreement, either by the Manhattan or the Metropolitan, that these sums shall be paid to the stockholders of the Metropolitan. Then there is the further provision that the Manhattan will, from time to time, execute in proper form a guaranty "to the above effect," printed or engraved on the certificates of stock of the Metropolitan, and, as such stock certificates are surrendered for cancellation and reissue, will, from time to time, at the request of the holder, "renew such guaranty" upon all reissued certificates. This was never done. The Manhattan never executed anything on the certificates. The Metropolitan issued the certificates with an unexecuted memorandum, which does not contain the word "guaranty," and contains

no contract or agreement or guaranty of any kind, but only a statement that the Manhattan has agreed to pay to the Metropolitan an amount equal to 10 per cent. per annum on the capital stock of the Metropolitan; that is to say, on the \$6,500,000, payable quarterly, commencing January 1, 1880. This was the interpretation put at the time on the agreement of the Manhattan by the Metropolitan, and accepted by each stockholder of the Metropolitan when he took his certificate. If any stockholder was entitled, on request to the Manhattan, to a guaranty of any kind executed by it on his certificate of stock, he waived his right to it. But, if he had asked for and received it, it would have been "a guaranty to the above effect," being a repetition of the agreement to make the quarterly payments to the Metropolitan; that is, an agreement to do what the memorandum states that the Manhattan had agreed to do. This would not have been any more of a contract between the Manhattan and the stockholder, or between the Metropolitan and the stockholder, than now exists.

2. The case, therefore, is not one of any vested right in the stockholders of the Metropolitan to the 10 per cent. payments, but it depends on the general power of the directors of a corporation to make and modify its contracts. That power is well established in this state. *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207, 216. Nor can the stockholders control that power. *McCullough v. Moss*, 5 Denio, 566, 575. No statute or authority is referred to which makes it necessary to the validity of the agreements of October 22d that they should have been approved by any one or more stockholders.

3. The leases and the tripartite agreement and the agreements of October 22d were made under the authority of the act of April 23, 1839, (Laws of New York, 1839, c. 218, p. 195,) which provides that "it shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract." There is nothing to impeach the validity of that statute. The instruments referred to are contracts by the Manhattan and the other two companies for the use by the former of the roads of the latter, on terms satisfactory to each of the latter, as determined by the votes of their boards of directors.

4. It is urged that the question should be considered as if the Metropolitan, on the failure of the Manhattan to fulfil its covenants in the lease, had re-entered, and as if the question were as to a new lease, with terms such as now obtain in the lease as modified. In this

view the new lease is objected to as *ultra vires*, because it appropriates the revenues of the Metropolitan, as a part of the general funds of the Manhattan, to pay preferred dividends to the New York. The contention is that the Manhattan is to receive all the earnings of the lines of the Metropolitan, and, after paying expenses, taxes, interest, etc., is to pay, first, a dividend of 6 per cent. on the stock of the New York; and that, as the earnings of the Metropolitan are not to be kept separate, no such arrangement can be made without the consent of the stockholders of the Metropolitan. The question is not one of power, but of good faith. If, in good faith, the discretion and judgment of the directors of the Metropolitan were fairly exercised, under the circumstances in which the affairs of the corporation were at the time, in view of all its embarrassments, and of the condition of the Manhattan, and of the litigations existing and threatened, and of the claims made against the Metropolitan and its stockholders by the Manhattan and the stockholders of the Manhattan, and of the relative conditions of the two properties, and of the past and the probable prospective earnings of the roads of the New York and the Metropolitan, no court will undertake to interfere with the exercise of such discretion and judgment, even though, on the same facts, it might have arrived or may arrive at a different conclusion, and even though the stockholders of the Metropolitan might have arrived at a different conclusion. In this view the remarks cited from the decision of Judge Westbrook become of great importance. His views in regard to the claim of the Manhattan for the \$13,000,000 were calculated to have great weight, and it is shown they did have great weight in regard to some of the terms of a new arrangement. The Manhattan had made two defaults in paying the dividend rentals, it had been put into the hands of receivers, it was alleged to be insolvent, and it was asserting the claims for \$13,000,000. It was perfectly clear that the interests of the public demanded that the two elevated roads should be under one management, and the interests of the public were the interests of the two lessor companies. The state of things was such that the common manager must be the Manhattan. Therefore, its obligations to the other two companies must be modified, because they were too onerous to be fulfilled. The only question was as to the new obligations. The evidence satisfactorily shows that the roads of the Metropolitan were not earning enough net money, over expenses, repairs, and taxes, to pay the interest on its mortgage bonds, and that the New York was earning at least 6 per cent. net, and enough more to make reasonable the preferences given to it over the Metropolitan

in the new arrangement. By that agreement the claims of the Manhattan for the \$13,000,000 are released. But, whatever conclusion now a judicial tribunal would come to, on proofs, as to whether the new arrangement was a wise and proper one for the Metropolitan to make, it is sufficient to say that, on the evidence now presented as to what was before the directors of the Metropolitan, and as to their action, they had a right to think, in good faith, that they were doing what was most judicious for their stockholders, and they did what they did in good faith.

5. It is contended that a fictitious necessity was created, and that the stockholders of the Manhattan would have come forward to extricate it from its difficulties. I see no evidence of this. The directors of the Metropolitan had this question before them, necessarily, and passed upon it and acted in view of it.

6. It is alleged in the bill that Messrs. Sage and Gould, while acting as directors of the Metropolitan to make the new arrangement in its behalf, were large holders of the stock of the Manhattan Company, and that Mr. Field was at the time a large shareholder in the Manhattan. The directors of the Metropolitan who voted to approve the agreement of October 22d were Messrs. Sage, Gould, Connor, Sloan, Dillon, Navarro, Stout, Dodge, and Porter. Mr. Garrison was absent. Mr. Kneeland voted in the negative. Leaving out Messrs. Sage, Gould, and Connor, six of the ten present voted in favor of the agreement. As to the supplemental agreement, there were ten directors present, Mr. Sloan being absent. Mr. Stout did not vote. Of the nine voting, Messrs. Sage, Gould, Dillon, Navarro, Connor, Dodge, Porter, and Garrison voted to approve the supplemental agreement, and Mr. Kneeland voted in the negative. Leaving out Messrs. Sage, Gould, and Connor, five of the nine voting voted to approve the supplemental agreement. There were eleven directors in all. Nothing is alleged in impeachment of the positions of Messrs. Sloan, Dillon, Navarro, Garrison, Stout, Dodge, or Porter. Therefore, whatever may be shown as to the positions of Messrs. Gould, Sage, and Connor, the legal aspect of the transaction is not affected.

Mr. Gould was elected a director of the Metropolitan on July 9, 1881. He states that at the time of making the settlement of October 22d he had an interest of 2,500 shares in the Metropolitan, and of 5,000 shares in the New York, his cash investment for the two being \$710,354.21, while his actual cash investment in the Manhattan was \$599,031.25.

Mr. Sage states that at the time of the agreement of October 22d he held about 1,200 shares of stock in the Metropolitan. He was appointed president of the Metropolitan in July, 1881. He says that at that time he had about 800 shares of the Manhattan stock, but within a few days thereafter "was short" of Manhattan stock, and from that time until after the agreement of October 22d bought no stock of the Manhattan, nor became interested in any, except for the purpose of fulfilling previous contracts; and that his pecuniary interest, if he "had any during the period, was to raise the price of Metropolitan stock and depress the price of Manhattan stock."

Mr. Field states that he sold out all his Manhattan stock, except 13 shares, in November, 1879, and sold those in March, 1880; and that he never bought or became interested again in Manhattan stock until October, 1881, after he "became convinced that a compromise would be made." But he sustained no fiduciary relation to the stockholders of the Metropolitan.

7. The concurrent testimony is that the Manhattan is now entirely solvent; made so, it is true, by the new arrangement, but still solvent. It is out of the hands of the receivers. The tripartite agreement and the leases, except as modified, are in force, and are in force as modified. The mortgage bonds, the issuing of which is sought to be restrained, are to be issued, it appears, under the tripartite agreement and the leases, and pursuant to resolutions passed before the agreement of October 22d, and their proceeds are to be used in perfecting the structure and equipment of the Metropolitan, and in securing the safety of those who travel on the road.

The motion for an injunction is denied.

The bill in the Gillett suit is verified by the plaintiff therein. The motion for an injunction in that suit is denied, and the restraining order is vacated.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO. v. SIOUX CITY & ST. PAUL
R. Co. and others.

(Circuit Court, D. Iowa. January 20, 1882.)

I. RAILROAD LAND GRANTS.

When the limits of two congressional railroad land grants made in the same act overlap, and there is no express priority in the disposition of such lands, or provision for the same, *held*, that each of the two railroads is entitled to an undivided half of the land.

The complainant in this bill asserts title as against the respondents to certain lands in Osceola, Dickinson, and O'Brien counties, in the state of Iowa, amounting to 189,184.59 acres. The controversy concerns the overlapping or conflicting limits of two congressional railroad land grants made in the same act without express priority in or provision for the disposition of the overlapping lands. The conflict occurs at and near the intersection of the two railroads claiming the land. The disputed lands all lie within the limits prescribed by the act of congress from the line of both roads. The congressional grant is contained in the act approved March 12, 1864, as follows:

CHAPTER 84.

An act for a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of a railroad in said state.

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that there be and is hereby granted to the state of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said state, to the south line of the state of Minnesota, at such point as the said state of Iowa may select between the Big Sioux and the west fork of the Des Moines river; also to said state for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said state, in a westerly direction, by the most practicable route, on or near the forty third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien, in said state, every alternate section of land designated by odd numbers for 10 sections in width, on each side of said roads; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sec-

tions, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the secretary of the interior, shall be held by the state of Iowa for the uses and purposes aforesaid.

Sec. 2. And be it further enacted, that the sections and parts of sections of land which by such grant shall remain to the United States within 10 miles on each side of said roads shall not be sold for less than double the minimum price of public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid.

Sec. 3. And be it further enacted, that the lands hereby granted shall be subject to the disposal of the legislature of Iowa for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the government of the United States free of all toll or other charges upon the transportation of any property or troops of the United States.

Sec. 4. And be it further enacted, that the lands hereby granted shall be disposed of by said state for the purpose aforesaid only, and in manner following, namely: When the governor of said state shall certify to the secretary of the interior that any section of 10 consecutive miles of either of said roads is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the secretary of the interior shall issue to the state patents for 100 sections of land for the benefit of the road having completed the 10 consecutive miles as aforesaid. When the governor of said state shall certify that another section of 10 consecutive miles shall have been completed as aforesaid, then the secretary of the interior shall issue patents to said state in like manner for a like number; and when certificates of the completion of additional sections of 10 consecutive miles of either of said roads are from time to time made as aforesaid, additional sections of land shall be patented as aforesaid until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the state for the uses aforesaid, and none other: provided, that if the said McGregor Western Railroad Company, or assigns, shall fail to complete at least 20 miles of its said road during each and every year from the date of its acceptance of the grant provided for in this act, then the state may resume said grant and so dispose of the same as to secure the completion of a road on said line and upon such terms within such time as the state shall determine: provided, further, that if the said roads are not completed within 10 years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the state of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the state shall determine: and provided, further, that said lands shall not in any manner be disposed of or encumbered except as the same are patented under the provisions of this act; and should the state fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

Sec. 5. And be it further enacted, that as soon as the governor of said state

of Iowa shall file or caused to be filed with the secretary of the interior maps designating the routes of said roads, then it shall be the duty of the secretary of the interior to withdraw from market the lands embraced within the provisions of this act.

Sec. 6. And be it further enacted, that the United States mail shall be transported on said roads and branch, under direction of the post-office department, at such price as congress may by law provide: provided, that until such price is fixed by law the postmaster general shall have power to fix the rate of compensation.

The McGregor road, on the ninth of August, 1864, located its line from McGregor to section 19, township 95, range 40, in O'Brien county, to intersect with a proposed road from Sioux City to the Minnesota state line, and on the thirtieth day of the same month filed its map showing said location in the general land-office; and in September following the lands within 20 miles were withdrawn from market. The line of 1864 is indicated on the map by the south blue line.

On the thirteenth of November, 1865, William M. Stone, then governor of Iowa, certified to the secretary of the interior the completion by the McGregor Western Company of 40 miles of the McGregor road, from McGregor to Calmar. No lands were patented to the McGregor Western.

In January, 1866, the Sioux City & St. Paul Railroad Company was organized, and on the seventeenth day of July, 1867, that company filed its map of location in the general land-office, from Sioux City to the Minnesota state line, and all lands within 20 miles of this line were withdrawn from market.

The line of this road as located and constructed, as it appears by the map, barely touches O'Brien county at the north-west corner, thus compelling the intersection at a point near said north-west corner. March 31, 1868, the state of Iowa resumed the grant to the McGregor Western Railway Company, and conferred it upon the McGregor & Sioux City Railway Company, now the McGregor & Missouri River Railway Company.

On the fifteenth day of March, 1876, the legislature of Iowa resumed the grant to the McGregor & Sioux City Company of 1868, and reconferred it on said company with new conditions. This act provided against disturbing the rights of the McGregor Company, or affecting the pending litigation over the overlapping land. This grant was never accepted.

On the twenty-seventh day of February, 1878, the legislature of the state of Iowa resumed all grants to the McGregor & Sioux City

Company, and regranted to the complainant company "all lands and rights to lands, whether in severalty, jointly, or in common, and including all lands, or rights to lands, or any interest therein, or claims thereto, whether certified or not, embraced within the overlapping or conflicting limits of the two grants, or roads made and described by the act of congress," and on the thirtieth of November, 1878, the governor of Iowa certified to the secretary of the interior the completion, by the complainant, of the road from Algona to Sheldon, the point of intersection in O'Brien county, in accordance with the granting acts, state and national. This made a complete line of constructed road between the *termini* fixed in the granting act.

In May, 1868, the commissioner of the general land-office, by letter to the governor of Iowa, required that the McGregor road should file a map showing the true line of the location through Clay and O'Brien counties to the "true point of intersection." This was in consequence of the fact that the line of the rival road was so located as barely to touch O'Brien county near the north-west corner.

The line of the McGregor road was accordingly relocated from the east line of Clay county, as shown by the map herewith filed, to the point of intersection at Sheldon, and maps of the same were certified and approved by the governor of Iowa and filed in the general land-office of the United States.

In March, 1869, Russell Sage, president of the McGregor & Sioux City road, wrote to the secretary of the interior requesting permission to change the location of the line from range 27 (Algona, Kossuth county) westerly, but the secretary refused permission to do so, and replied that "after a road had been definitely located, the map thereof filed and accepted, and the lands withdrawn, no specific authority is given whereby the department can accept another location."

The secretary of the interior approved list No. 1 of lands for the McGregor Company, for 133,459 acres, on account of road constructed to Mason City. A portion of these lands were situated as far west as 33 degrees.

The governor of Iowa, on the eleventh day of February, 1873, certified that the Sioux City & St. Paul Company had constructed its road, commencing at the south line of the state of Minnesota, and ending at Le Mars, a distance of 56½ miles, and the secretary of the interior patented the overlapping or conflicting lands to the state for the benefit of the defendant company.

In December, 1877, the governor and register of the state land-office, in pursuance of an act of the legislature requiring the same to

be done, certified to the Sioux City & St. Paul Company the overlapping lands, the same now in controversy, "subject, however, to conflicting claims."

John W. Carey, General Solicitor Milwaukee & St. Paul Railroad Company, for complainant, with *Thomas Updegraff* and *Melbert R. Carey*, of counsel.

E. C. Palmer and *J. H. Swan*, for respondent.

LOVE, D. J. The grant in question is to the state of Iowa upon certain trusts clearly indicated by the terms of the granting act. If anything in both law and reason is unquestionable, it is that any construction of the grant or administration of the trust which should defeat the manifest purpose of the grantor ought, if possible, to be avoided. What was the purpose of congress in making the grant? Was it to secure the construction of one of the roads provided for, or both of them? It was manifestly the purpose of the grant to secure the building of both roads. The construction of one of these roads, and especially the shorter and less important of the two, would clearly have fallen far short of the end contemplated by congress. The grant was not a pure donation. Congress was induced to make it by certain considerations of benefit to the public and to the remaining lands. It is evident that congress gave the lands in aid of a project to connect the Mississippi river at McGregor with the Missouri at Sioux City by means of these two roads,—one some 250 miles in length, running from the east to the west; the other only about 60 miles long, running in a different direction. There was to be a junction of these roads in O'Brien county. Without this intersection there would have been a failure to connect the two rivers, which was, beyond question, one of the principal objects of the enterprise. If no road had been completed but the short line from the state line to Sioux City all the chief purposes of the grantor would have been to a very great extent defeated. These purposes were—*First*, the general benefit to the state and people which would result from a through line between the rivers; *second*, the sale of the government reserved lands at the double minimum price on both lines through a country without timber or fuel to aid settlement; *third*, the use of the roads by the United States, expressly reserved in the third and sixth sections of the act, for the transportation of troops, property, and the public mails.

It is manifest that the non-completion of the greatly more important line of road would have resulted in defeating the main purposes of congress, and in a loss to the United States of certain considera-

tions of great value and importance which appear upon the face of the grant. What, then, is the fair inference as to the intent of congress respecting the lands within the overlapping limits at the junction of the roads? Could it have been the purpose of the grantor that the trustee should so administer the grant as to give the whole of the lands at that point, lying as they did within the limits as to both roads, to the short and comparatively unimportant line of road? Of what avail would it have been as to the great purposes of congress, and with respect to the considerations stipulated for by the United States, if by the aid of the lands granted the short line from the state line to Sioux City had been completed, and the main line left incomplete at a point 80 or 90 miles east of the point of intersection? Most certainly we can arrive at no conclusion other than that it was the intention of congress to divide the lands at the point of intersection between the two enterprises. What possible reason can there be, in the absence of express words, to impute to congress an intention to give all the lands at the point of junction to one or the other of the two enterprises? Such a disposition of the lands would, in our judgment, do violence to the intent of the grantor, which, if possible, ought to prevail.

As a matter of course, the intent of congress to give the lands to one or both roads was dependent upon the performance of the conditions of the grant; in other words, upon the construction of the roads according to the terms of the act and the legislative will of the trustee. To illustrate this view, suppose congress should in the same act make a grant to two parallel roads running so near to each other as to give rise to overlapping limits, would it not be the manifest intention of the grantor, in the absence of words to the contrary, that the lands should be divided between the two enterprises? The purpose of such a grant would be to secure the building of two roads, but by giving all the lands to one road the building of the other would be defeated, and thus the purpose of the grantor would be thwarted.

But the United States is not the only party to the grant. There are other parties beneficially interested in it. The consideration for the grant is to be performed by the railway companies contracting with the trustee to do the work, and the question arises, when is their right to the land complete? Their right is certainly not made complete by the mere establishment of the definite line of their road. Neither is their title to their line consummated by a grant to them by the trustee; or, in other words, by an act of the state legislature giving them the lands. The grant being to the state *in presenti*, the

establishment of a definite line gives it certainty and fixed limits. The grant then ceases to be afloat. The legal title to the lands in place passes to the state by virtue of the fixed line. The limits of the indemnity lands are also thus fixed, and the title passes to the trustee to certain and specific tracts of land so soon as the lands are selected. But when is the right of the beneficiary, the railway company, to the lands complete? Never, certainly, until the company has performed its contract with the trustee by the construction of the work according to the law of the state granting the lands for that purpose. This law becomes the contract between the railway company and the trustee, and any rights which the company may have in advance of performance on its part are merely inchoate. But when the railway company has built the road in compliance with the will of the legislature, and in accordance with the act of congress granting the lands, its right to the lands, in law and equity, is complete. It has then performed the consideration upon which it is entitled to the land, and it would be a positive wrong to the company so performing to deprive it of the consideration flowing to it under the contract.

Now, it so happens in the case before us that both the complainant and defendant companies have performed their respective contracts with the state of Iowa. They have both built their roads in accordance with the legislation of the state and of congress. The complainant company has constructed its road to the acceptance of the state to the point of intersection in O'Brien county, as required by the act of congress. The complainant company now claims one-half of the lands lying within the overlapping limits. The defendant company resists this claim, and seeks to exclude the complainant entirely from the lands within the same limits. The whole of these disputed lands lie within the limits fixed by the act of congress to the lands in place and the indemnity lands coterminous to both roads.

This brings us to the consideration of the grounds of law and equity upon which the defendant company claims the whole of the disputed lands to the entire exclusion of the complainant company. It is not our purpose in this opinion to review all the various propositions urged by the respondents in support of their position. This, within any reasonable limits, would be impracticable. We will, therefore, confine our attention to the consideration of the defendant's positions, which we regard as those upon which they must stand if the ground they occupy can be maintained at all. In so doing we shall not follow exactly the order pursued by the respondent's counsel.

The respondent contends that the Sioux City & St. Paul road was prior to its rival in location and construction, and that "priority of location of route, of construction of road, and of selection of lands on the line of location give prior, paramount, and exclusive title to the lands thus selected." This proposition is untenable. It is impossible to conceive that congress could have intended that the whole of the lands within the overlapping limits should go to one or the other of the enterprises in question. The only rational inference is that congress intended that both roads should participate in these lands. Now, by applying the principle that priority of location and construction gives priority of right, it would have been inevitable that the intention of congress would have been utterly defeated. Both roads could hardly, in the nature of things, be located and constructed at the same precise time. It was inevitable that one should be located and constructed sooner or later than the other. The McGregor enterprise had more than 250 miles to locate and construct; the Sioux City & St. Paul about 60 miles. A race of diligence between them would have been no race at all. If congress had intended that the principle of priority should be applied it might just as well have given the lands at the place of intersection outright to the Sioux City & St. Paul enterprise. Nothing but an utter want of all diligence on the part of the last-named enterprise could have given the McGregor Company any chance whatever to secure a single acre in the overlapping limits.

Take the case for illustration of a grant in the same act to two parallel roads with overlapping limits. In such a case, if one road, by superior diligence in location or construction, or both, could secure all the lands, the building of the other road would be prevented and the will of the grantor defeated, for it must be assumed that in such a case the purpose of the grantor would be to secure the building of both roads, and not one or the other of the two. Hence we are clear that the principle of priority contended for cannot be adopted to solve the difficulty of overlapping grants, and in this we are sustained by authority. See Mr. Justice Miller's opinion on page 24 of complainant's brief; Mr. Justice Harlan's, on page 25 of same; also, Judge Dillon, in 4 Dill. 307.

Again, the defendant's counsel contend that the rights of the complainant company *were* immutably fixed by the line which the McGregor Company caused to be located and returned to the proper department of the government in August, 1864; that by virtue of this line the limits of the grant under which the complainant claims

were established; that thereupon the lands in place on that line passed to the trustee from the United States, and the grant ceased to be afloat; and that no power in the government, except congress, could change that line so as to authorize the complainant company to go beyond its prescribed limits on either side for lands in place, or for indemnity lands. If this view can be sustained it seems to be conceded that no considerable part of the lands in dispute can be awarded to the complainant. Doubtless, in ordinary cases of land grants for railroads, the principle for which the defendant contends prevails. When the line of the road is definitely located and assented to by the proper department the limits of the grant are fixed; titles to specific lands accrue to the state in trust for the enterprise, and to purchasers from the United States, within the defined limits of the grants; and any subsequent change of the line and the consequent limits of the grant would lead to great confusion of rights and titles.

But we are of opinion that the grant now before us is peculiar, and that the rule claimed by the defendant cannot be strictly applied to it. Here was a grant in the same act for two railroads which were to intersect each other in O'Brien county. There was no authority in the law to make the intersection beyond the limits of O'Brien county, and if the law had been in this regard violated, we can see no ground upon which the McGregor Company or its successors could have claimed the land. Now, until the line of the Sioux City & St. Paul road was located it was simply impossible to fix definitely the line of the other road through O'Brien county to the point of junction, so as to conform to the requirements of the act of congress. Hence the line of 1864 within O'Brien county was necessarily an open and indefinite one until that of the rival company was established, about two years later. If at any time before the location of the defendant's line in O'Brien county the line of 1864 had been projected westward, the point of intersection would have been beyond the limits of O'Brien county. We judge both from the nature of the case and the history of the transaction that both the federal and state governments must have regarded the line of 1864 within the limits of O'Brien county as open and indefinite until the line of the other road was located. It matters not, in our opinion, that the line of 1864 may have been accepted and acted upon by both governments as to public lands lying upon it east of Clay county. Such a recognition of it is not, as far as we can see, at all inconsistent with a contemplated change of the line in Clay and O'Brien counties, so as to make it conform to

the requirements of the act of congress with respect to the point of intersection.

The line of 1864 was projected upon paper very soon after the passage of the act, by the sole authority of the McGregor Company, for the apparent purpose of causing the lands to be withdrawn from market. This line was not surveyed, staked out, and platted according to the requirements of the regulations. No monuments were placed to designate it upon the face of the earth. Some two years later the line of the Sioux City & St. Paul Company was located, and instead of its running through O'Brien county, as there was reason to suppose it would, its projectors located it so as barely to touch that county very near its north-west corner, as seen on the map herewith filed. It then became necessary to change the line of 1864 so as to make the intersection. Suffice it to say that the change which was in fact made was with the assent of the land department at Washington, and in order to comply with the requirements of the act of congress. Defendant's counsel contend that this change of line was not made by the order of the government at Washington. This is immaterial. It is a contention more about words than anything else. It is beyond question that the commissioner of the general land-office assented to the change; and, indeed, the inference seems irresistible that he required it to be made. It is not material that there was no formal order for the change. Thus, Mr. Wilson, the commissioner, in his letter to the governor of Iowa, bearing date May 13, 1868, says that "in view of adjusting the grant respectively it is desirable to have the true point of intersection in O'Brien county in accordance with the statute;" and he requests that at an early day a map properly authenticated, showing the true location of the line through Clay and O'Brien counties to the point of intersection with the Sioux City & St. Paul Railroad, be filed, etc.

This clearly shows—*First*, that the grant in Clay and O'Brien counties had not then been adjusted upon the old line of 1864. If the commissioner considered the last-named line as definitely located, why could not the grant be adjusted in Clay county and in O'Brien to the old terminus without a map showing the "true" location of the line through Clay and O'Brien to the "point of intersection?" It is evident that in the view of the commissioner the old line through Clay and O'Brien was not the "true line," and that the true line could not be located without reference to the point of intersection.

Again, the commissioner, in a letter of October, 1868, to D. C. Shepard, civil engineer, having in charge the duty of relocating the line

through Clay and O'Brien to the point of junction, says to him that "by the act of congress of May 12, 1864, it is required that a map be duly filed in the department, properly authenticated, showing the located line of road through Clay and O'Brien counties to the point of intersection with the Sioux City & St. Paul road;" and in this letter the commissioner, in order to enable Mr. Sheppard to make the survey and proper returns, enclosed to him a diagram showing the located line of the McGregor Western road to the eastern boundary of Clay county, and of the proposed line of said road through Clay and O'Brien to the point of intersection in the latter county; also forms of authentication to be attached to the maps which Mr. Sheppard was to make and return. Now, all this is entirely inconsistent with the defendant's view that the line had been definitely located through Clay county and a part of O'Brien county ever since 1864.

But what follows is still more explicit. In a letter of November 3, 1868, the commissioner again writes to Mr. Sheppard:

"I am in receipt of your letter of the twenty-seventh ultimo, asking further instructions as to the point of intersection of the McGregor, etc., with the Sioux City, etc., road. In answer, I have to state that the act of May 12, 1864, expressly states that the McGregor Western Railroad 'shall intersect the road running from Sioux City to the Minnesota state line, in the county of O'Brien,' which, according to the located line of the last-named road, the point of intersection will be at the north-west corner of O'Brien county. In regard to your proposition to delay the survey of the line till spring, I have to request and insist that the work be commenced immediately, in order that this office may determine by sectionized limits the lands to be held at \$2.50 per acre within 10 miles of each side of the located line running through Clay and O'Brien to the point of intersection."

Here again is clear proof that the line of 1864, through Clay and O'Brien counties, was not regarded and treated by the government as definitely settled, and as fixing the limits of the grant to the McGregor enterprise; and if, as defendant's counsel contend, the commissioner's action in the matter did not amount to a positive order for a relocation of the line from the eastern boundary of Clay county to the point of junction, it was such a requirement as could not be ignored or disregarded by the McGregor Company. Nor is this action of the commissioner at all inconsistent with his refusal to accede to Mr. Russell Sage's request. Mr. Sage asked permission to relocate the line from a point (Algona) about 40 miles east of the east line of Clay county. It is evident that the commissioner considered the line fixed and established from that point to Clay county; and it had, doubtless, been acted upon in the department. The com-

missioner declared that he had no authority to assent to a relocation of the line from that point, because it had been definitely located, the map thereof filed and accepted, and the lands withdrawn. But the commissioner might well assume that he had authority by virtue of the act of congress requiring the intersection in O'Brien county to require such a relocation of the line as to make it conform to the terms of the act; and at what point on the old line the deflection northward, to accomplish that purpose, should commence, must, of course, have depended upon circumstances. The commissioner might well have considered himself authorized to indicate the point in question. It was imperatively necessary that some one should fix the point of departure from the old line, and we see no reason why the commissioner was not that person. At all events, it is beyond question that he did require the relocation through Clay and O'Brien counties, and that he suspended the adjustment of the land grant until the relocation was effected.

The relocation was made in compliance with the act of congress. Who is now objecting to the changed line? Not the United States or any purchaser of alternate sections from the United States. The secretary of the interior, Mr. Schurz, clearly, in his decision of April 8, 1880, recognized the changed line through Clay and O'Brien counties to the point of junction. The only party complaining of the change as unauthorized and nugatory is the defendant company, and yet the change was made necessary by the action of that company in locating its line. First, there was long delay in making the location, and in the second place the line was so located as barely to touch O'Brien county, rendering it impracticable to comply with the act of congress without abandoning the old line of 1864. We think it would be unjust and inequitable to allow the defendant company to exclude the complainant from a participation in the disputed lands upon grounds that arose from the delay of location under its enterprise, and the final location of its line at the extreme north-west corner of O'Brien county.

The respondent's eighth proposition is that "the lands in controversy were earned by the defendant company under the provisions of the act of congress of May 12, 1864, as early as 1871," and that "these lands had not only been earned by the construction of the road directly through them, but they had been patented to the state for the benefit of the defendant company, and they had been mostly conveyed by the state to the company in obedience to legislative command.

It is further said that "all the lands claimed, with the exception of here and there a small tract, had been patented to the state for the benefit of the defendant company long prior to the passage of the act upon which the complainant rests its claim of title.

The facts upon which this proposition rests seem to be briefly as follows:

On the twelfth day of February, 1873, Mr. Secretary Delano addressed the following letter to Hon. Willis Drummond, then commissioner of the general land-office.

"DEPARTMENT OF THE INTERIOR,

"WASHINGTON, D. C., February 11, 1873.

"SIR—I have examined the case of the *McGregor & Missouri River R. Co. v. The Sioux City & St. Paul R. Co.*, on appeal from your decision, and I find that the Sioux City & St. Paul Company first located and constructed its line along the lands in controversy and is entitled to the same.

"I reverse your decision, and herewith return the papers transmitted by you.

Very respectfully,

C. DELANO, Secretary.

"Hon. Willis Drummond, Commissioner General Land-Office."

In pursuance of this decision the lands in controversy were patented to the state of Iowa for the use and benefit of the Sioux City & St. Paul Railway Company.

Afterwards, to-wit, on the thirteenth day of March, 1874, the legislature of the state of Iowa passed an act providing that the governor of the state should certify to the Sioux City & St. Paul Railroad Company all lands which were then held by the state of Iowa in trust for the benefit of said railroad company, in accordance with the provisions of section 2, chapter 144, of the Laws of the Eleventh General Assembly. Turning to said section 2, chapter 144, we find the following:

"Sec. 2. Whenever any lands shall be patented to the state of Iowa in accordance with the provisions of said act of congress, said lands shall be held by the state in trust for the benefit of the railroad company entitled to the same, by virtue of said act of congress, and to be deeded to said railroad company as shall be ordered by the legislature of the state of Iowa at its next regular session or at any session thereafter."

In pursuance of this legislation the governor of the state did certify the lands in controversy to the Sioux City & St. Paul Company, subject, however, to "conflicting claims." It is claimed that this qualified clause, saving all "conflicting claims," is nugatory, since the governor had no authority to impose it. Such, however, seems not to have been the view taken of the governor's action by the general assembly of the state of Iowa, since we find that in the act of 1878, transferring to the complainant company the lands and rights belonging to the McGregor enterprise, the following provisions occur:

"Sec. 2. That all lands and rights to lands, whether in severalty, joint tenancy, or in common, and including all lands or rights to lands, or any interest therein, or claims thereto, whether certified or not, embraced within the overlapping or conflicting limits of the two grants made and described by the act of congress hereinafter designated, etc., be and the same are hereby granted, etc., to the Chicago, Milwaukee & St. Paul Railroad Company."

Again, in section 3:

"When said railroad shall have been built and constructed to the point of intersection with the Sioux City & St. Paul Railroad, etc., the governor shall patent, etc., to said Chicago, Milwaukee & St. Paul Railway Company all the remaining lands belonging to and embraced in said grant appertaining to their line of railroad, including all or any part or moiety of the lands in said overlapping limits which by the terms of the act of congress appertain to their line of road."

We regard the eighth proposition, now under consideration, as the strongest and most cogent relied upon by the respondent's counsel, and it brings back our minds to the true and decisive question of the case, namely, what is in this respect the true construction of the act of congress granting the lands? Was it the intention of the grantor that the lands in dispute should be applied to the building of two roads instead of one, and held in common by the companies, fulfilling the conditions of the grant? Or is it the true construction of the grant that one of the companies might by priority of location and construction entitle itself to the whole of the lands within the overlapping limits to the entire exclusion of the other? If this is the true construction, it was competent for the executive department of the federal government and the trustee to patent the lands for the use and benefit of the defendant corporation to the exclusion of the complainant.

But if, as we hold, it was the purpose of congress and is the true construction of the act that the lands should be applied to the building of both roads; that no one company could by mere priority entitle itself to any exclusive right; that, on the contrary, the other company, by actually building its line to the point of junction, in accordance with the terms of the grant and the legislative will of the trustee, would entitle itself to equal participation in the lands,—then it was not competent for the executive department or the trustee to give the lands exclusively to the defendant company. If our construction of the grant be correct, the defendant company, by building their line of road, could "earn," so to speak, no more land than the law gave them,—that is, one undivided half of them; and if, by the action of the executive department and the trustee, they obtain the legal title to the whole of the lands, they must hold them subject to the trusts created by the grant in favor of the other company. This trust equity will enforce according to its own well-known remedial processes.

Mr. Secretary Delano's decision, which seems to be the source of the defendant's claim of exclusive right, proceeded upon the sole ground of priority of location and construction. This was manifestly

erroneous in point of law, and it cannot be admitted to exclude the complainant company from its equal right to lands earned by it in compliance with the *conditions imposed by the legislative will* of the trustee and act of congress.

It is not, we think, in the power of the secretary of the interior, by an erroneous interpretation of the law, to confer upon one party lands which, by the true construction of the statute under which he acts, belong to another and different party.

Counsel for the respondents take a distinction between the lands in place and the indemnity lands under the grant of 1864. They contend that the law makes it the duty of the secretary of the interior to cause the indemnity lands to be selected, and that his action in that behalf is conclusive, and cannot be reviewed; and since the indemnity lands within the overlapping limits under this grant were selected upon the defendant company's line, and for the defendant company exclusively, there is no power anywhere to review the action of the secretary, and change or reverse the same.

This argument, we think, simply confounds the legal and equitable title to the lands. The selection of the lands in the indemnity limits may be conclusive so far as it operates to fix the legal title in the state as trustee, but we are quite clear that he had no power, in a case like this, to decide the question as to what company or companies should be entitled to the beneficial interest in the lands. The ultimate decision of such a question was necessarily a matter of judicial cognizance. It depended upon conditions of which the secretary could have had no legally-competent means of information. The lands in place and the indemnity lands were granted by congress for precisely the same purposes. The intention of the grantor with respect to them was exactly the same. Both were subject to the same trusts. The mode of making the title of the trustee specific was different, but when that title became certain in the trustee by the location of a definite line in one case, and by selection in the other, it was the duty of the trustee to apply the two kinds of land to precisely the same trusts. It was not competent for the secretary of the interior to dispose of the selected lands to any trust or purpose not warranted by the true construction, meaning, and purpose of the granting act. He could not give these lands wholly to one road or one company, if the true construction of the grant requires that they should go to two roads and two companies.

If by the true construction of the grant the McGregor enterprise was entitled to one-half the lands in controversy, and if the company representing that enterprise has "earned" that half by the construction of the road, it was not in the power of the secretary to deprive them of their beneficial interest contrary to law. He might indeed cause a patent to issue investing the respondent company with the legal title; but a court of equity will nevertheless enforce the trust according to the true intent and meaning of the act of congress, which is the paramount law of the trust.

It may be granted that in the matter of selecting the indemnity lands the action of the secretary of the interior is conclusive, but it by no means follows that his designation of the party entitled to the beneficial interest in the lands is conclusive.

It was said in argument by respondent's counsel that the respondent company had paid out considerable sums for land-office fees and perhaps other expenses in perfecting the title to the lands in question. The question as to sums so expended we leave open to future discussion, with the suggestion that if the defendant is entitled to be paid any part of such expenses, we see no reason why the pleadings may not be amended so as to bring that matter before the court, and the decree so framed as to adjust the same according to equity.

We have said in the foregoing opinion that the complainant claims not the whole, but one undivided moiety of the disputed lands. The bill may be framed upon a different theory, but the general solicitor of the complainant corporation, in his closing argument, distinctly stated that the complainant claims title to only a moiety of the lands in common with the defendant company.

McCRARY, C. J., concurs.

LANNING v. LOCKETT.*

(Circuit Court, S. D. Georgia, W. D. January 24, 1882.)

1. PLEADING—PLEA IN BAR.

A plea denying title of plaintiff in a suit on a promissory note, and alleging that the note is the property of a citizen of the state in which the suit is brought, and not the property of the plaintiff, although pleaded here in the form and style of a plea to the jurisdiction, is, in reality, a plea in bar.

2. SAME—STATE LAWS.

Such a plea is not demurrable, although filed, without any other plea, in the United States circuit court held in a state, the statute of which provides that a party cannot inquire into the title of a holder of a note except for his protection or to let in some defence.

3. PROMISSORY NOTES—AUTHORITY OF CASHIER TO INDORSE—PRESUMPTION.

In the absence of proof of any regulations curbing or restricting his authority, the presumption is that the indorsement of a negotiable promissory note, belonging to the bank, by the cashier, was authorized, and such indorsement passes the title to the note.

4. COLLATERAL SECURITY—RIGHT OF HOLDER TO SUE.

The *bona fide* indorsee of a negotiable promissory note, who takes it as collateral security for a pre-existing debt, is a holder for a valuable consideration, and may maintain suit thereon in the United States courts; and the right to sue is not invalidated by the fact that the note was transferred to such indorsee (a citizen of another state) for the purpose of enabling him to sue thereon in the United States courts.

Suit by plaintiff against defendant, B. G. Lockett, on a promissory note for \$6,000. It was payable to order of Macon Bank & Trust Company, and indorsed to plaintiff by J. W. Cabaniss, cashier.

The defendant filed a plea in the form and style of a "plea to the jurisdiction," alleging that the note sued on was not the property of the plaintiff, but the title to the note was in the Macon Bank & Trust Company, a corporation having its legal domicile in the western division of the southern district of Georgia, and that the transfer thereof by the Macon Bank & Trust Company, the payee, to the plaintiff, a citizen of New York, was purely colorable, and for the mere purpose of enabling the plaintiff to bring suit in the United States court. No other plea was filed.

Plaintiff demurred to the plea on the ground that by section 2789 of the Code of Georgia, and decisions of the supreme court of Georgia thereon, the defendant could not inquire into the title of a *bona fide* holder of the note except to let in some defence, and that, inasmuch as no other defence was set up in this case, the defendant could not make an issue on the plaintiff's title to the note.

*Reported by W. B. Hill, Esq., of the Macon bar.

The evidence as to the transfer of the note by the Macon Bank & Trust Company to the plaintiff was, in brief, as follows:

J. W. Cabaniss, cashier of the Macon Bank & Trust Company, was sworn by the defendant, and testified that he, as cashier, "made the transfer of the note for the Macon Bank & Trust Company to the plaintiff. The Macon Bank & Trust Company is in liquidation. It has ceased to do business, and all its affairs are in charge of the president, Mr. G. B. Roberts, and myself, as cashier. I made the transfer of this note to the plaintiff after consultation with Mr. Roberts. The directors of the Macon Bank & Trust Company were not consulted about it. It is not customary for the president and myself to consult them. They have left to us the winding up of the assets of the bank. For the note, Mr. Roberts paid me his check on the Exchange Bank for \$3,000 at the time of the transfer in 1879. I am also cashier of the Exchange Bank, and Mr. Roberts is a director of that bank. The check for \$3,000 I have never collected. It is among the assets of the Macon Bank & Trust Company. Roberts has always had enough money in the Exchange Bank to pay the check, except, perhaps, occasionally his deposit may have run below that amount; but the Exchange Bank would have paid the check at any time. Roberts has no control whatever of the check. There is no agreement that the check shall not be collected. There is no entry of this transfer on the books of the Macon Bank & Trust Company. There are a great many transactions of the company not yet entered up on the books; but I have *data* from which I can post them all up."

Benjamin G. Rockett, the defendant, was also sworn, and testified that at the time of the maturity of the note he was abundantly solvent, and worth largely more than the amount of the note.

G. B. Roberts, sworn for plaintiff, said: "I was indebted to the plaintiff in 1879 to the amount of \$8,000. I gave her a mortgage on realty to secure \$5,000, and gave to her as collateral security for the remaining \$3,000 the note now in suit, for which I gave the Macon Bank & Trust Company my check for \$3,000; at the same time (March, 1879) I had the cashier of the company indorse the note to the plaintiff. I do not remember whether the plaintiff ever had the note in possession. It was turned over to Bacon & Rutherford, attorneys at law, with a letter from her. She is my niece. If the plaintiff should get judgment in this case and collect the whole amount of the note from the defendant, I am under no obligation to pay back to the Macon Bank & Trust Company the excess of that amount over \$3,000, for which I gave my check. At the time I gave the check, which was for about 50 per cent. of the amount of the note, there were doubts about the solvency of the defendant; at least, it was known that he was heavily in debt. While under no obligation, I would not be willing as president to make a profit out of the bank, and I should pay to the bank the excess of the recovery over the \$3,000."

The court held that the plea in this case, although filed as a plea to the jurisdiction, was in reality a plea in bar, being, in substance, a denial of the plaintiff's title and right to sue, and overruled the demurrer to the defendant's plea on the grounds that the contract of

the maker of a negotiable note is to pay it to whomsoever may be the legal holder, and that the local law of Georgia cannot be applied to this case so as to shut off the defence made by this plea.

ERSKINE, D. J., (*charging jury.*) This note is indorsed to the plaintiff by the cashier of the Macon Bank & Trust Company. It is the usual course that the cashier of a bank has power to indorse negotiable instruments belonging to the bank. The presumption is that he has the right and authority to make such indorsements, in the absence of any evidence that the regulations of the bank have limited or abrogated this authority.

The evidence is that the cashier delivered to Mr. Roberts, the president of the bank, and that Roberts gave him therefor his check on the Exchange Bank for \$3,000, about 50 per cent. of the face of the note, and that this check still remains in the possession of the Macon Bank & Trust Company. This check has not yet been paid, but the liability of Roberts is the same, and if he gave the check *bona fide* for the note it was a payment therefor.

The note is presented to you by counsel for the plaintiff. This makes out for the plaintiff a *prima facie* case. There is no evidence showing that the plaintiff ever had the actual possession of the note. This was not necessary, if it was indorsed to her *bona fide*, and she was aware of it, as a collateral security for a pre-existing debt of Roberts to her. If thus indorsed to her, she obtained as good a title as if she had purchased it.

No party can obtain the right to sue in the United States courts by a device, or colorable transfer. If the plaintiff has no title to the note, we will find for defendant on this issue. You will inquire whether the *prima facie* case of the plaintiff has been overcome by any evidence that the transfer to her was not *bona fide*. If it was *bona fide*, she has the right to sue, although Roberts indorsed it to her for the purpose of giving the court jurisdiction by enabling her to maintain the suit.

Verdict for the plaintiff.

KEEP v. INDIANAPOLIS & ST. LOUIS R. Co.***KEEP v. UNION RAILWAY & TRANSIT Co.***

(Circuit Court, E. D. Missouri. February 13, 1882.)

1. TRIAL OF CAUSES OF A LIKE NATURE AT THE SAME TIME—REV. ST. § 921.

Federal courts have authority to order causes pending before them of a like nature, and in which substantially the same questions are involved, though against different defendants, to be tried at the same time, even where, in consequence, the defendants will be brought into antagonism.

2. SAME—JUDGMENTS.

Where causes, one of which sounds in tort and the other in contract, are tried at the same time, separate judgments may be rendered in each.

3. PRACTICE—JOINT WRONGS—SEPARATE SUITS.

Where several tort-feasors are each and all liable for the same wrongful act, a separate suit for damages may be maintained against each of them.

4. COMMON CARRIER—NEGLIGENCE—MOTIVE POWER.

A common carrier is liable to a passenger whom it has contracted to convey to a particular point, if he is injured while being so conveyed through the negligence or unskilfulness of employes of a corporation with which such carrier has contracted for motive power.

5. LIABILITY OF PARTY FURNISHING MOTIVE POWER—NEGLIGENCE—UNSKILFULNESS.

In such cases the corporation furnishing the motive power is also liable to the passenger if the injury is sustained through the direct negligence or unskilfulness of its employes.

Motions for a New Trial.

Separate judgments having been rendered against each of them, both of the defendants in the above-entitled causes move for a new trial. The motion of the Union Railway & Transit Company assigned as error:

(1) That the verdict is unsupported by the evidence, but is contrary thereto, and is against the evidence and the weight of evidence. (2) That the verdict is for the plaintiff, whereas it ought to have been for the defendant. (3) That the court erred in refusing to give the instructions asked by defendant at the close of plaintiff's case. (4) That the court erred in refusing to give the instructions asked by defendant at the close of the evidence in the case. (5) That the court erred in giving the instructions which were given by the court to the jury. (6) That the court erred in its instructions given to the jury. (7) That the court erred in its instructions given to the jury after they retired, and in answer to their inquiry to the effect that "if each company is at fault the same amount of damages should be rendered against each." (8) That the court erred in admitting improper and illegal evidence against the objection of the defendant; the court erred in rejecting legal, competent, and

*Reported by B. F. Rex, Esq., of the St. Louis bar.

material evidence offered by the defendant. (9) That the court erred in consolidating the above-named case of *Henry V. Keep v. Union Railway & Transit Co. of St. Louis* with the case of *Keep v. Indianapolis & St. Louis R. Co.*, and in trying the same together. (10) That the verdict after consolidation should have been a joint verdict, and the judgment joint. (11) That the damages are excessive.

The motion of the Indianapolis & St. Louis Railroad Company sets forth substantially the same assignments of error as that of the Union Railway & Transit Company, with the exception of the third, fourth, ninth, and tenth assignments, which are omitted.

For a report of the trial of said cases see 9 FED. REP. 625 *et seq.* *L. B. Valliant* and *Joseph Dickson*, for plaintiff.

John T. Dye, for Indianapolis & St. Louis Railroad Company.

S. M. Breckenridge, for Union Railway & Transit Company.

TREAT, D. J. At the calling of these cases they were consolidated for purposes of trial—that is, the court ordered that they should be tried at the same time, before the same jury; yet each case to be treated as distinct, and requiring a separate verdict. Such has been the uniform practice of this court for a quarter of a century, commencing with the administration of Justice Catron, of the supreme court, (Wells and Treat, associated,) to the present time. Such practice was based on the act of July 22, 1813, (now section 921, Rev. St.,) which is as follows:

“When causes of a like nature or relative to the same question are pending before a court of the United States or of any territory the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.”

It often happened, under the land litigations prevalent here from 25 to 30 years ago, that from 50 to 100 cases in ejectment would be brought by one plaintiff against different tenants in possession, the main subject in controversy being the plaintiff's title. Instead of trying each of said cases separately, involving one or two weeks' time each, and resting on the same evidence as to title, the court could order all to be tried at once, so that the court could determine whether the plaintiff had a right of recovery as against the defendants who claimed under a common title adversely.

If the plaintiff recovered, a separate verdict was rendered against each of the defendants as to damages, and the particular premises occupied by him; and if the plaintiff failed, a separate verdict was

rendered in favor of each defendant, with costs. Like practice has prevailed here in all cases within the provision of the act of 1813 whenever the court's attention was directed to the subject.

The cases under consideration fall clearly within the practice thus long established; and this is the first time in 25 years that it has been disputed. It must be said, however, that there may be a difference between the consolidation of cases to be tried as one case, and the trial of separate cases before the same jury at the same time. Many of the authorities and text-writers cited do not note the distinction, and few make any reference to the act of 1813.

From facts and circumstances brought to the attention of the court, it was obvious that the same question was involved in each of these two cases, viz., whether the plaintiff sustained damages through the negligence of one or the other of the defendants, and if so, whether one or both were responsible therefor. If the cases were tried, one after the other, the same evidence would have to be presented, to the unnecessary delay of business. No exception was taken to the order of the court, and, if it had been, it would have been promptly overruled. The reason and justice of the act of 1813 must be apparent to all who desire the prompt determination of litigated cases, without useless costs and expense.

It is contended that by this practice the two defendants were brought into antagonism with each other, as well as with the plaintiff, whereby an unnecessary burden, attended with some confusion, was thrown on the transit company. But so, in like cases, it always became the duty of the court to discriminate, as it did in these cases, between the respective duties and liabilities of the defendants.

The cases were peculiar in several respects. The wrong done occurred under such circumstances as at first blush to make it a question between the defendants *inter sese* as to which was in fault. To the plaintiff, who could have but one satisfaction, it was immaterial whether one only or both defendants were responsible to him. As to the liabilities of the defendants *inter sese* he had no concern. He had a right of recovery against both, (as held,) and if either paid therefor it could adjust with the other any controversy which might arise between them.

The principal facts were that plaintiff purchased a through (coupon) ticket from New York to the city of St. Louis; the last coupon being over the Indianapolis & St. Louis Railroad Company from Indianapolis to St. Louis. That coupon did not authorize the contracting party or parties to leave the plaintiff in East St.

Louis, to find his way over the bridge and through the tunnel to the St. Louis depot as best he might. Some one was responsible for his safe transfer to and delivery at the St. Louis depot, involving the bridge and tunnel transfer.

It is contended earnestly that the Indianapolis & St. Louis Railroad Company was an intermediate road between New York and St. Louis, whose terminus was at East St. Louis, and although its conductor took up the terminal coupon, and gave a bridge and terminal ticket, that in doing so it acted only as the agent of the transit company, its own responsibility terminating at its station in East St. Louis; that from that point the transit company became the connecting and terminal road. To this there are two objections: *First*, the terminal coupon was from Indianapolis to St. Louis, over the Indianapolis & St. Louis Railroad; and, *second*, that the accident happened before that railroad company actually reached its station or depot at East St. Louis, where it would have delivered its passengers if bound to the latter place. Besides, it had its arrangements with the other defendant for hauling its cars over the bridge and through the tunnel; the latter furnishing merely the motive power. The trains were not taken up at East St. Louis; there was no transfer of passengers there; the train was a through one. Each through passenger retaining his seat was to be landed at the St. Louis depot, through the operation or agency of the contracting party or parties.

Whose duty was it on the arrival of the train at East St. Louis to forward the same? Had the obligations of the Indianapolis & St. Louis Railroad, under the circumstances, then ceased, and all the common carrier's obligations thereafter been devolved on the transit company? In that connection the court received written evidence as to the corporate character of the transit company, and its contracts with the defendant railroad. It ruled, as a matter of law, that for all the purposes of these suits the transit company was the agent of the railroad, bound to haul the latter's trains, merely furnishing the motive force and managing the same. Hence, the railroad was a common carrier, responsible for the acts of its agent.

It may be that under other facts and circumstances, and possibly under later arrangements, a different relationship legally may exist between those companies; but the court, in trying these cases, could not go beyond the record before it.

The facts were that on the arrival of the railroad train in East St. Louis, and before the same had reached the Relay depot, its locomotive was detached for the purpose of having the transit company's

engine attached. The passengers were still in the cars. The transit company's engine, in attempting to attach to the train, did so with such negligence as to cause the injury complained of. The train itself should have advanced to or nearer the Relay depot before the locomotive was detached; and, on the other hand, the transit engine, in connecting, should have done so without thrusting the train across the track of another moving train. Hence, as stated in the charge of the court, the railroad company was bound to deliver the plaintiff safely, under the obligations of a common carrier, in St. Louis, and was responsible for whatever injuries were caused by the negligence of its agents. As to the transit company, though under its contracts with the defendant it was its agent, yet if in the course of its employment it injured, through its direct negligence, a third party, with whom it had no privity of contract, still it was answerable to him for the wrong so done. Questions as to the pleadings are raised, drawing formal distinctions between contracts *ex contractu* and *ex delicto*, which are irrespective of the merits of the case, and which, if well taken, would have resulted at the trial in formal amendments, if required.

The question involved may be of large significance. The many railroad trains arriving at and departing from the St. Louis depot use, under contract with the transit company, the motive power of the latter. To whom is the passenger to be remitted for injury suffered? He departs and arrives by his contract, not at East St. Louis, but at St. Louis, on the west side of the river. The intermediate agency by which he is transferred to and from the St. Louis depot, so far as his contract is concerned, is not a separate contract, remitting him for redress when an injury has been sustained solely to such intermediate agency; but, as in these cases, he may, under acts of negligence, have his remedy against either or both.

The questions, sharply defined, are whether the obligations of the Indianapolis & St. Louis Railroad ceased, under the circumstances stated, when its locomotive was detached from its train at East St. Louis; and, on the other hand, whether what occurred subsequently involved a liability solely against the transit company.

As has been stated, a mixed question of fact might have been presented if the duties of the Indianapolis & St. Louis Railroad had terminated when it left its cars on the track in East St. Louis, short of the Relay depot, and if its obligations ceased only when the cars reached the Relay depot, and if in that intermediate stage of transfer the transit company undertook to haul the train, not to the Relay depot

but to the St. Louis depot. The court thought it unnecessary to confuse the jury with such questions, but, having the charter and contracts of the transit company before it, decided, as a matter of law, that the Indianapolis & St. Louis Railroad was bound to deliver plaintiff in St. Louis; that its obligations could not be discharged by any arrangement made by it with the transit company. It is thus that the main propositions arise. If the transit company was a common carrier, and the obligations of the Indianapolis & St. Louis Railroad Company terminated on surrendering the cars of its train to the former, as the terminal company, then the latter was not responsible. But it had not reached its depot in East St. Louis, and, whatever may have been its understanding with the transit company, the facts showed that the injury to plaintiff occurred during the process of discharging one motive force and attaching another. The various authorities cited as to consolidation of causes, it is held, do not change the rule. It is true that when several causes of like nature are brought against the same defendant he may move to have them consolidated; but it does not follow that causes of like nature against different defendants may not be heard at the same time, each case being heard and determined as a distinct case, as was done in this instance. Several text-writers and some adjudicated cases have been cited on the question of consolidation, which it is not deemed necessary to review, for most of them refer to state statutes considered inapplicable; and the two cases in United States courts are not in conflict with the views heretofore expressed.

In 1 Batchf. 151, a motion was made to have a demurrer in one of eleven cases control the others, and the court denied the motion. Ample grounds, therefore, may have existed; just as in several cases between the same plaintiff and defendant the court will, in its discretion, not compel the decision in one to determine the others, unless the rights of all can be properly heard and settled in one of the suits—the others to abide the result.

The case of *Holmes v. Sheridan*, 1 Dill. 351, is illustrative, where the court, instead of consolidating the cases as if only one and the same cause of action was presented, ordered the two cases to be tried at the same time, and referred to state statutes for authority.

Sections 977 and 978 of the Revised Statutes indicate that the legislation of congress was directed to the trial of cases at the same time by formal consolidation or otherwise, when the time of the court could be thereby saved, costs and expenses avoided, and the rights of the parties litigant not prejudiced. It may seem somewhat anomalous

that each of the defendants is to be held as for the same *tort*; but there may be several *tort-feasors*, each and all of whom are liable for the wrong done. The fact that separate suits were brought does not exonerate either from his wrongful act. The plaintiff may have had, as in these cases, a cause of action against each of the defendants, and entitled to judgments accordingly if tried separately; and why not such separate judgments when tried at the same time, though one sounded in *tort* and the other in contract? The distinctions drawn as to the relative duties and obligations of the two defendants are analogous to those imposed on a tow-boat in towing a steamer, as contradistinguished from or associated with the vessel towed. Judge Swing has clearly analyzed the law in such respects in the recent case of *The James Jackson*, 9 FED. REP. 614. The motions for new trial overruled.

UNITED STATES *ex rel.* WATTS *v.* JUSTICES OF LAUDERDALE COUNTY.

(Circuit Court, W. D. Tennessee. January 27, 1882.)

1. CONTEMPT—MANDAMUS—RESIGNATION OF OFFICERS.

It is not a contempt of court for an officer to resign to avoid obedience to a writ of *mandamus* where he has an unrestricted right of resignation.

2. SAME—CONSTITUTIONAL LAW—TENNESSEE CONSTITUTION 1870, ART. 7, § 5, CONSTRUED.

The Tennessee constitution, art. 7, § 5, provides that "every officer shall hold his office until his successor is elected or appointed and qualified." *Held*, that this applies to a resigning officer, who must continue in the discharge of his duties until his successor is elected or appointed and qualified; that the officer remains under an obligation to obey a writ of *mandamus*, notwithstanding his resignation, and is guilty of contempt if he fails to comply with the writ; and the obligation passes to his successor when qualified.

Rule for Contempt.

The relator recovered a judgment in the circuit court of the United States against Lauderdale county for \$25,664.32, interest and costs, on bonds and coupons issued by the county in aid of the Memphis, Paducah & Northern Railroad, which judgment was affirmed by the supreme court. The circuit court thereupon issued a peremptory writ of *mandamus* requiring the 26 justices of the peace composing the county court to levy a tax as other taxes were levied, and to collect the same, to pay the judgment. In order to evade obedience to the writ 21 of the justices tendered their resignation to the county

court, which were accepted, leaving the county without a quorum in the court authorized to levy the tax. This was not done until service upon them of the writ of *mandamus*, nor until they had assembled and proposed to the attorney of relator negotiations for a compromise, which ultimately failed. The affidavits disclose a conflict of evidence between the attorney and the justices as to what transpired at the time of the meeting of the justices, they insisting that he waived or excused a levy, and agreed to submit the proposition for compromise to his client, while he insists he did not interfere with the writ, but only agreed to submit a proposition to his client on their undertaking to make a levy either at that term or an adjourned term to be held for the purpose. The court was adjourned to a subsequent day, when the relator's refusal of the compromise was presented, and, being received, the justices resigned in sufficient numbers to leave the court without the number required to make a levy. The sheriff of the county has never held elections to fill the vacancies, as required by law, and the affidavits show a condition of great public hostility to any levy of a tax, and a determination of the people and the officers to do all in their power to escape payment of the bonds, which are claimed to be fraudulent, notwithstanding the decision of the supreme court in favor of their validity.

The relator served this rule upon the justices to show cause why they should not be punished for contempt of the process of the court, claiming that the act of resignation was a contempt, and that the constitution continued the resigning officers in office until their successors are qualified. The defendants answer the rule by setting up their right to resign as a defence, and excusing their failure to comply with the writ before the resignation on the ground of the agreement with the attorney of the relator. Some of the justices swear that they resigned on account of bad health and other causes not connected with the *mandamus* proceedings, while others rest alone on the legal right of resignation.

Humes & Poston, for relator.

Gantt & Patterson and *Emerson Etheridge*, for respondents.

HAMMOND, D. J. I am unable to see why an officer served with a *mandamus* to levy taxes should be compelled to remain in office to discharge that duty any more than to discharge any other duty imposed by law. The *mandamus* directs him to do what by law he should do without it, but does not, in any legal sense, make the duty more binding. *U. S. v. Clark County*, 95 U. S. 769. If an officer is justified in surrendering his office because its duties are disagreeable

to him, or for any reason he does not wish to perform them, why may he not give it up for that reason as well after as before mandatory process, and this without any responsibility for or inquiry into the motive for his action? It seems to me wholly untenable, when an officer has the right of resignation, to hold that he is guilty of contempt of court if he resigns rather than obey a writ of *mandamus*. He cannot delay obedience without contempt, and he remains in contempt as long as he continues in office without obedience. *Hoff v. Jasper County*, 20 Am. Law Reg. (N. S.) 435. But if before the opportunity to obey arrives, or before the time prescribed by law for obedience, he resigns effectually or vacates the office, I do not recognize in the act of resignation any contempt, no matter what his motives. The mere fact that the creditor may be thus defeated of his remedy does not furnish a reason, though even this is merely temporary, as the successor is amenable to the same process. *Com'rs v. Sellew*, 99 U. S. 624; *Thompson v. U. S.* 103 U. S. 480, 484; *U. S. v. Labette County*, 7 FED. REP. 318, 320. No authority has been produced which supports the contrary doctrine, and I think these views accord with the general principles involved in the consideration of the subject, and are a proper inference from the cases. *Rees v. Watertown*, 19 Wall. 107; *Barkley v. Levee Com'rs*, 93 U. S. 258; *Meriwether v. Garrett*, 102 U. S. 472, 511-518; *Edwards v. U. S.* 103 U. S. 471; *Thompson v. U. S. supra*.

The leading question in this case is whether or not these respondents have effectually resigned, or are still the justices of Lauderdale county and liable for a non-compliance with the writ commanding them to levy the tax to pay the relator's judgment. This question depends upon a proper construction of the constitution of Tennessee, and there is no decision of the supreme court of the state to guide the court in its determination.

Prior to the constitution of 1870 there can be but little doubt that the laws of Tennessee permitted to all officers the most unrestricted right of resignation. The resignations of the respondents were tendered according to the Code and accepted by the county court, which was, under the law as it existed, independently of the constitution, sufficient to vacate their offices, although relator's counsel suggest that a formal acceptance is required, which was wanting as to some of the justices. It seems, however, to be generally conceded by the authorities that where the officer or tribunal designated by law to receive resignations has no duty to perform in respect to supplying a successor, the bare receipt of the resignation without objection

amounts to an acceptance. Dill. Mun. Corp. § 163, and cases cited; McCrary, Elec. § 260, and cases cited; *Edwards v. U. S. supra*; *Thompson v. U. S. supra*; *Olmsted v. Dennis*, 77 N. Y. 378; *State v. Hauss*, 43 Ind. 105; *State ex rel. Boecker*, 56 Mo. 17.

Under the influence of the common law, which was very strict as to the surrender of an office held by patent, requiring that document to be surrendered and cancelled, and the general principle of that system of laws which treated offices as property, whether held by grant from the crown or otherwise, it may be doubtful, particularly in view of its interpretation by the supreme court of the United States in the two cases last above cited, if this rule would apply, and whether a more formal acceptance would not be necessary. But it is conceded by the court in those cases to be a question of local law in each state, and I have no doubt whatever that under our state law it must be held that receiving without dissent and filing the resignation by the authority appointed to receive it constitute an acceptance and answer the common-law requirement of that ceremony. 2 Meigs, Dig. (2d Ed.) § 746; 3 King, Dig. (2d Ed.) §§ 3973, 3974; T. & S. Code, *passim*, tit. "Officers" and "Resignation." The authorities are too numerous for citation here.

A justice of the peace who wishes to resign shall make his resignation to the county court of the county of which he may be a justice. Act 1806, c. 54, § 1, (T. & S. Code, § 353.) Whenever a vacancy in the office of a justice of the peace occurs, it is filled by special election to be held for the purpose on ten days' notice. Act 1835, c. 1, § 15, (T. & S. Code, § 342.) All special elections for county officers, authorized by law, shall be ordered by the sheriff of the county, or the coroner, in case the sheriff cannot act or in case there is no sheriff; and he may proceed without any formal notice of vacancy to hold the election. Code of 1858, (T. & S. Ed.) §§ 804, 827. From this it will be seen that the county court, in receiving the resignation, acts independently of the sheriff in holding the election, there being absolutely no connection between the two. Other provisions of the Code are cited by the learned counsel of respondents requiring the justice on his resignation to turn over his dockets, books, and papers to the nearest justice of the peace who is authorized to issue executions, etc., as showing his untrammelled right of resignation. T. & S. Code, §§ 4126, 4136, 4139, 4143, all taken from the Act of 1835, c. 17.

These provisions of the statutes, which show so conclusively the modification, if not the abrogation, of the common law governing the

resignation of these officers, do undoubtedly take this case out of the rule of *Edwards v. U. S.* and *Thompson v. U. S. supra*, and bring it within a principle, there discussed, that it is a matter of local regulation that must control this case. But these statutes were all prior to the constitution of 1870, which declares that "every officer shall hold his office until his successor is elected or appointed and qualified." Article 7, § 5, T. & S. Code, p. 108. The former constitutions, under which the foregoing and similar statutes were passed, contained no such provision. It was, however, a principle of the common law that every officer held his office until his successor was qualified, and he could not surrender it without consent of the crown or other appointing power, or the election of his successor where it was an elective office; and this, as we have seen, was the basis of the rule that an acceptance of a resignation was necessary to give that consent and vacate the office. It was manifested by a cancellation of the patent of office, a formal acceptance of the surrender or resignation, or impliedly by the appointment or election of a successor. Indeed, the common law would compel the acceptance of an office, and a refusal to assume it was indictable as an offence. 5 Comyn's Dig. tit. "Officer," B 1; *Id.* K 4, 9, *passim*; *Id.* tit. "Justices of Peace," A 1; Bac. Abr. 322m; *Anon.* 12 Mod. 256; *Rex v. Mayor of Rippon*, 2 Salk. 433; S. C. 1 Ld. Raym. 563; *Rex v. Patten*, 4 B. & A. 15; *Worth v. Newton*, 10 Exch. 247; *Lond n v. Headden*, 76 N. C. 72; *Stratton v. Oulton*, 28 Cal. 45; *People v. Stratton*, *Id.* 382; *Edwards v. U. S. supra*; *Thompson v. U. S. supra*.

Nor was there wanting a solid foundation of good reason for the principle. The services of officers are necessary to organized society; and any hiatus or interregnum tends to disorganization. If one's property, services as a soldier, his very life, in fact, may be taken to preserve society, there is no reason why his personal services, in an official capacity, may not be demanded and insisted on by the state. Enforced jury service furnishes a conspicuous example of the principle, as well as compulsory attendance of witnesses, and there may be others. Our own constitution says:

"No man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor." Article 1, § 21, T. & S. Code, p. 82.

Not only is this compulsory service supported under this doctrine of necessity, but likewise under the contract. It is true, the bestowal of an office is not, in the ordinary technical sense, a contract,—at

least, not with us,—but is the imposition of a public trust by agreement between the state and the officeholder. Why may not the state attach as a condition to the bestowal of the honors and compensation growing out of the trust, that it shall not be surrendered until the state has designated a successor, so that the public interests shall not suffer? It must be admitted that under our free American institutions there has grown up a tendency to recognize such unrestrained personal liberty that the citizen has acquired a sort of right to refuse to serve the state in any official capacity, and it is often said that no man can be compelled to hold an office against his will; but *non constat* that the state may not reasonably restrain this right for the public good. There can be no more reason for requiring an officer, whose term has expired, to hold till his successor is qualified, than for making the same requirement of one who resigns; one is as great a burden as the other. Counsel say this is a “momentous question;” but, reduced to its exact dimensions, it is simply a defence by these respondents of the right to retire from their offices some 10 days sooner than under this construction of the constitution and laws of the state they would be permitted to do; and in furtherance of their rights to do this they insist that the words of the provision should be restricted so as to exclude them from its operation. It is no great hardship to say to a justice of the peace that he shall continue in office until his successor is elected and qualified, when that process, in due course of law, can be consummated in some 15 days. And it will be found that, as to all offices, the constitution and statutes make abundant provision for very speedily supplying a successor to a resigning officer, and ordinarily there is no lack of patriotic citizens ready to take advantage of the rare opportunity of becoming a successor to one resigning. On the other hand, it may be said, as it has been argued here, that this abundant provision for supplying successors is the only remedy the law has afforded for the evil of having an office vacant, and that the law-makers considered that speedy process of filling vacancies an ample guaranty against the mischief. But this case illustrates the contrary. Where there is an epidemic of resignations, caused by a conspiracy to defeat the law, which will, and has in this case, destroyed the machinery of local government, and paralyzed all governmental functions so far as they pertain to those assumed by these respondents, the wisdom of the common-law rule becomes obvious. Here, although the sheriff or coroner is required, by fair implication, to give immediate notice of

election to be held in 10 days, no steps have been taken for many months to supply the county with these officers so necessary to execute the laws. Much has been said in argument about provisions made to turn the books and papers over to the nearest justice. That is beside the question; because, while the six or seven remaining justices in this county may suffice to discharge the judicial duties, no provision is made to prevent a disorganization of the county by this conspiracy of the magistrates, the sheriff, and no doubt the people of the county, to avoid the levying of this tax, although it results in leaving all other duties belonging to the county court in its ministerial capacity undischarged.

It is a paralysis of this governmental agency, and, if permitted to continue, destroys it effectually. I am unable to see why a construction of the constitution should be adopted which allows this mischief to prevail, when the other would effectually remedy it, for the mere purpose of securing to officers unrestricted liberty to surrender their offices at will, or why this freedom of the citizen should be secured at the expense of so great a calamity to the public good. The case comes within the letter and spirit of the constitutional provision, and the mischief is clearly within the remedial efficacy of the clause. It is a presumption of law that the convention saw the evil of the former policy of unrestricted resignations, and desired to restore the rule of the common law for the public good, that no officer shall abandon the discharge of his duties until his successor has been elected or appointed and qualified. It is a wise provision, one within the power of the state to make, and the courts are required to liberally construe it in favor of the remedy and to prevent the mischief. Cooley, Const. Lim. (4th Ed.) 71, 72, 74, 75, 79; Story, Const. §§ 300, 401; Sedgwick, Stat. & Const. Law, 359, 491. The legislature has given this constitutional provision effect by enacting a statute *in totidem verbis*. Act 1870, c. 23, § 7, (T. & S. Code, § 825g.) It is very strenuously argued that this provision was only intended to apply to officers whose terms had expired, and to accommodate the change made by the constitution of 1870 in the tenure of offices. Under the construction of the old constitution, when a vacancy occurred the person elected to fill it held for a full and not an unexpired term, while the new constitution abrogates that construction, and gives fixed terms of office, which expire at the completion of the term, whether held by the original incumbent or one supplied to fill a vacancy. T. & S. Code, 109, note a. There is no apparent reason why the clause we are construing was more needed under

the new constitution than under the old, for it could have been applied as well under the one as the other system of terms, and would have been just as wise. There is nothing in the constitutional provision itself to indicate such a restriction, nor in the proceedings of the convention, and the mischief to be remedied comes clearly within the words, and, I think, the spirit of the clause. It is also argued that the court should not assume an intention to abrogate the settled policy of the former statutes permitting unrestricted right of resignation. But it may be remarked that the constitutional convention of 1870 was a reform convention, and the radical changes it made are evidenced throughout the whole instrument, particularly in this matter of office tenure; and a constitutional convention is supposed to act with a purpose to cure existing evils and with a foresight of those that are possible. If it had intended to prevent the occurrence of the disorganization of a county government, such as the product of this conspiracy, it would have used the very language it has used. If it had intended to restrict the provision to officers whose terms had expired, it would have said: "All officers whose terms have expired shall hold their offices until their successors are elected or appointed and qualified;" but it does not say this. It says "every officer" shall so hold, and this includes those about to resign. He may resign and create a vacancy *sub modo* which authorizes the election or appointment of a successor, but he cannot abandon his office until that successor is qualified. It is said this literalism would continue officers removed for crime, but this is not a reasonable construction. There is a paramount public policy which would endure the mischief of an absolute vacancy rather than have offenders in office continue to discharge its duties. The removal statutes are penal in their nature, and come under the general principle that crime must be punished at all hazards. *Hyde v. State*, 52 Miss. 665; *Allen v. State*, 32 Ark. 241.

On the whole case, after a most careful consideration, I am thoroughly satisfied, notwithstanding the strong conviction I had at first the other way, that, on principle, the proper construction of our constitution is that under this clause and the statute to give it effect all officers resigning must continue to discharge their official duties until their successors are elected and qualified. The case of *Badger v. U. S.* 93 U. S. 599, is a direct authority for this construction, and is conclusive here, in the absence of any contrary construction by the supreme court of the state. *Vide* S. C. 6 Biss. 308. There are some cases which support a contrary view, as *Olmsted v.*

Dennis, supra, but they cannot prevail in this court over the views expressed by the supreme court of the United States.

This attitude of the case renders it unnecessary to consider the other points so much argued arising out of the failure to act before resignation, when there was an opportunity to obey the writ and the effect of the negotiations with the relator's attorney to excuse obedience. It may be said, however, that several of the respondents show no excuse, except the pendency of negotiations for a compromise; and it is doubtful if the attorney's action, taking it for all that can be claimed, afforded any justification. The magistrates certainly acted in bad faith to him in conspiring to defeat a levy by resignations after his indulgence. There was an implied understanding that if the compromise failed the writ would be obeyed, and it was a fraud on the relator to act otherwise. The whole case shows a deliberate intention on the part of these officers, no doubt in obedience to popular sentiment, to circumvent the obligation imposed by law to levy the tax to pay these bonds. I have been inclined to at once impose as a penalty for this contempt the whole judgment as a fine, distributing the sum among the respondents according to their respective abilities to pay, and to commit them until the fines and costs were paid and the writ obeyed; but, on reflection, I have concluded to afford another opportunity for obedience to the writ of *mandamus*, having received assurances that if the court decides the resignations ineffectual no further resistance will be made to the process. The court therefore adjudges respondents in contempt of its process, but for the present withholds sentence, and directs an *alias mandamus* to issue requiring these respondents, and their successors in office, to levy the tax at the next regular levy in April, as other taxes are levied, and to collect the same as required by law; and until it shall be made known to the court how the writ has been obeyed, all other matters are reserved.

So ordered.

NOTE. By an able review of this case by Robert W. Haywood, Esq., printed in the Brownsville (Tenn.) *Democrat*, I am reminded of an unintentional omission to notice an argument, made also at the bar on the trial of this case, that the construction adopted would continue officers removing from the county or state in their offices. Our constitution itself provides that justices of the peace and constables removing from the civil district shall vacate the office, which makes an exception to the general rule of the clause construed in the principal case. Article 6, § 15. Perhaps a paramount public policy analogous to that so declared would make an exception in all cases of

removal from the county or state, but it does not seem to me that the existence of that policy, any more than in case of removal for crime, should abrogate that on which the decision of the principal case is attempted to be founded. The same reply may be made to the argument of the reviewer, that the decision of the principal case would abolish the rule that the acceptance of an incompatible office operates as a resignation of the first. And if the rule of the common law, that all officers were to hold until their successors were qualified, never obtained in Tennessee, and was, therefore, not *restored* by the constitution, it only, it seems to me, amounts to saying it was *ordained* by the clause construed.

E. S. H.

UNITED STATES v. JONES.*

(Circuit Court, S. D. New York. January 23, 1882.)

1. CRIMINAL LAW—INFORMATION UNDER SECTION 5480 OF THE REVISED STATUTES—SCHEME TO DEFRAUD.

The sending through the mail of a letter calculated to induce the purchase of counterfeit money at a low price, for the purpose of putting it off as good money, constitutes an offence such as is created by section 5480, Rev. St., notwithstanding the absence of evidence showing an intention to defraud any particular person.

2. SAME—SAME—CORPUS DELICTI—ADMISSIONS BY DEFENDANT.

The gist of the offence is the abuse of the mail. The mailing of the letter and the letter itself, showing its unlawful character, constitute the *corpus delicti*. That defendant was the sender, may be proved by his admissions to that effect.

3. SAME—SAME—EVIDENCE AS TO HANDWRITING.

It is not allowable to permit the jury to inspect a copy of such letter, made by the accused in their presence, for the purpose of comparing the handwriting. To allow this would be to permit the accused to make evidence for himself. Nor can the evidence of an expert, not proven to be acquainted with the handwriting of the accused, be received as to whether such letter and copy were in the same handwriting.

4. SAME—EVIDENCE OF HANDWRITING—STATE STATUTE.

The statute of a state permitting a comparison of writings for the purpose of determining handwriting, has no effect upon criminal proceedings in the courts of the United States.

Motion for New Trial.

BENEDICT, D. J. The accused was tried upon an information framed under section 5480 of the Revised Statutes. Having been convicted he now moves for a new trial. One ground of the application is that the evidence failed to make out an offence such as is described in section 5480. The evidence was, and the jury under

*Reported by S. Nelson White, Esq., of the New York bar.

the charge must have found, that the accused devised a scheme to put counterfeit money in circulation by sending through the mail to one Bates a letter calculated to induce Bates to purchase counterfeit money at a low price, for the purpose of putting it off as good. The evidence further showed, and the jury found, that the accused, in order to carry his said scheme into effect, did place in the post-office at New York city a letter such as described in the information, for the purpose of inducing Bates to purchase counterfeit money at a low price, in order that he might put it off as good money for its face value. This evidence was sufficient to make out an offence such as is created by the statute under which this information was framed, notwithstanding the absence of any evidence to show an intention on the part of the accused to defraud Bates or any other particular person.

The scheme to defraud described in the information may be a scheme to defraud any person upon whom the bad money might be passed, and it is within the scope of the statute, although no particular person had been selected as the subject of its operation. Any scheme, the necessary result of which would be the defrauding of somebody, is a scheme to defraud within the meaning of section 5480, and a scheme to put counterfeit money in circulation is such a scheme.

We are, therefore, of the opinion that the offence charged was proved by the evidence.

Another point taken is that there was no evidence of the *corpus delicti* except the defendant's admission. But the gist of the offence consists in the abuse of the mail. The *corpus delicti* was the mailing of the letter in execution of the unlawful scheme. There was direct evidence of the mailing of the letter by some one, and the letter itself showed its unlawful character. This much being shown, it was certainly competent to prove that the defendant was the sender of the letter by his admission to that effect.

Another point made is that error was committed at the trial by the refusal to permit the jury to inspect a copy of the letter proved to have been mailed, which copy the accused made in the presence of the jury. In this there was no error. It is not allowable, upon an issue as to handwriting, to put in evidence papers, otherwise irrelevant, merely for the purpose of enabling the jury to institute a comparison of the writing. The statute of the state of New York, permitting a comparison of writings for the purpose of determining handwriting, has no effect upon criminal proceedings in the courts of the

United States. In those courts the extent of the rule is to permit the jury to compare writings lawfully in evidence for some other purpose. It has never been permitted to introduce writings for the mere purpose of enabling the jury to institute a comparison of writings. To permit the practice here sought to be established would be to permit the defendant to make evidence for himself.

The last point made is that error was committed in refusing to permit an expert in handwriting to say whether the original letter put in evidence by the government, and the copy of it made by the accused in the presence of the jury, were in the same handwriting. Here was no error. It was not shown that the expert knew the defendant's handwriting, and whether the two letters were in the same handwriting was immaterial, except upon the assumption that because the copy of the letter was made by the defendant it was in his usual handwriting,—an assumption by no means justifiable by the circumstances under which the copy was made.

The motion is accordingly denied.

GOTTFRIED v. MILLER.

(Circuit Court, E. D. Wisconsin. May Term, 1881.)

1. LETTERS PATENT—PITCHING BARRELS—INFRINGEMENT.

The transfers of the title to the patent granted to Gottfried & Holbeck May 3, 1864, for a new and improved mode of pitching barrels, traced from the transfers of the original patentees to the transfer of date December 15, 1879, from Stromberg to Gottfried. *Held*, so far as here shown, that Gottfried's present source of title is this transfer from Stromberg of date December 15, 1879; and that, therefore, he cannot prosecute a suit for infringement against one to whom Stromberg sold a machine, November 25, 1872, containing the patented improvement, because privy to Stromberg's prior grant; as Stromberg cannot prosecute a suit against such prior grantee neither can he.

In Equity.

Banning & Banning, for complainant.

Flanders & Bottum, for defendant.

DYER, D. J., (*orally*.) I have not been able to prepare an opinion in this case, but as counsel desire to know what are the grounds of the judgment of the court, I will state them. This is a bill in equity to restrain the infringement of a patent, No. 42,580, granted to the

complainant and J. F. T. Holbeck for an improved mode of pitching barrels, and for an account and damages.

The patent has been heretofore sustained in this court in a contest between the complainant and parties other than the present defendant. *Gottfried v. Philip Best Brewing Co.* 17 O. G. 675.

On the twenty-fifth day of November, 1872, one Stromberg sold to the defendant, Miller, a pitching machine, containing, as it is understood, the patented improvements, which he has since used. The material question in the present controversy relates to the validity of the defendant's title under his purchase from Stromberg, and consequently to his right to use the machine. The determination of this question involves, necessarily, the examination of a series of transactions between various parties, who at different times had or claimed to have some interest in the patent, which transactions constitute the history of the title, and are disclosed by the evidence in the cause.

The patent was granted to Gottfried & Holbeck, May 3, 1864. On the nineteenth day of December, 1870, Gottfried, by written assignment, in consideration of five dollars to him paid, and a royalty to be paid of \$10 on every machine to be manufactured by Holbeck, sold and transferred to Holbeck all his interest in the patent and the invention, reserving to himself, however, in the same instrument, the right to revoke the assignment if the royalty reserved should not be paid; and on the third day of January, 1871, Holbeck sold and assigned to Charles F. Smith and Henry C. Comegys an undivided two-thirds of all his right, title, and interest in and to the patent. Then, on the twenty-fifth day of January, 1871, the title to the patent being at that time in Holbeck, Smith, and Comegys, they, by a written assignment, transferred all their right, title, and interest in and to various patents, including the Gottfried & Holbeck patent, to the Barrel-Pitching Machine Company of Baltimore. The assignment contained this provision:

"The same to be held and enjoyed by the said company as fully and entirely as they would have been held by us if this assignment and sale had not been made; with the exception that the said company shall not assign to any one but ourselves any or all the interests in and to the above-named patents, in the proportion as they are now held by us. This assignment to hold good until the dissolution or liquidation of the said company, when the said company shall reassign to us in the same proportions as now assigned by us."

In order, as it would seem, to more completely place in the Barrel-Pitching Machine Company the title to the patents mentioned in the

assignment of January 25, 1871, Holbeck, Smith, and Comegys, on the first day of June, 1871, made a further assignment to the company of their interests in the patents mentioned in the first assignment. This second assignment contained the provision—

“That said corporation shall not assign any, or all, or any part of the interests hereby assigned in said patents, to any other person or persons except the grantors herein named, in proportion to their several and respective interests in the same, as held by them before any assignment to said corporation; and provided, also, that this assignment shall continue in full force until the dissolution of said company, in which event, or in the event of the liquidation of the affairs of said company, the several interests of each grantor in said patents shall, subject to the lawful rights of the creditors of said corporation, be reassigned to each grantor.”

Now, as I have already stated, on the twenty-fifth day of November, 1872, which is the next date in chronological order, John H. Stromberg made a sale to the defendant in the present suit of a pitching machine covered by the complainant's patent. On the twenty-fifth day of March, 1875, Gottfried, by written instrument, undertook to revoke and rescind the assignment which he had made to Holbeck on the nineteenth day of December, 1870, for the reason, as recited in the instrument of revocation, that Holbeck had neglected to pay the royalty upon the machines which he had manufactured. On the twenty-seventh day of October, 1875, an agreement was entered into by and between Holbeck and Stromberg whereby Holbeck, in consideration of the sum of \$1,000 paid to him, undertook to sell and assign to Stromberg one undivided half of his right and title in and to the patent in question, and it was agreed that they should make articles of copartnership, and that Stromberg should furnish the capital to carry on the business of manufacturing pitching machines as described in the patent. On the ninth day of December, 1875, the directors of the Barrel-Pitching Machine Company resolved that all the right, title, and interest of the company in and to this patent, acquired by the assignment from Smith, Comegys, and Holbeck, should be assigned and conveyed back to those parties for the sum of \$500, and it was further resolved that Charles F. Smith, who was the president of the Barrel-Pitching Machine Company, be directed to execute and deliver to Smith, Comegys, and Holbeck an assignment on behalf of the Pitching Machine Company. On the eleventh day of December, 1875, in pursuance of the resolution just mentioned, an instrument was executed which purported to be an assignment from the Barrel-Pitching Machine Company to Smith, Comegys, and Holbeck of all the

right, title, and interest of the company in and to the patent. The attestation clause and signature were as follows:

"In testimony whereof, and in pursuance of a resolution passed by said company on the ninth day of December, 1875, a copy of which is appended hereto, the said Charles F. Smith hath hereto set his hand, as the act of the said company, this eleventh day of December, 1875.

[Signed]

"CHARLES F. SMITH,

"President Barrel-Pitching Machine Company."

Then, on the same eleventh day of December, 1875, Smith, for the alleged consideration of \$500, granted and assigned to Holbeck & Gottfried all his right and title to the patent, and afterwards, on the seventh day of June, 1876, Comegys transferred to Stromberg all his interest in the patent.

It next appears that on the ninth day of October, 1876, Gottfried, Holbeck, and Stromberg, who are named as jointly interested in the patent, by a certain instrument in writing, appointed one Latrobe, of Baltimore, their attorney, with authority to prosecute suits against infringers of the patent, and to compromise or adjust the same. This instrument contained the following clause:

"And it is understood that all expenses, costs, and charges, including counsel fees, attending the litigation, if any, shall be deducted from the collections aforesaid, and the balance paid over to the parties hereto in the proportion of their interest in the said patents; and particularly it is understood that the said John H. Stromberg shall be paid out of said collections, as fast as made, all moneys that he may have advanced in the prosecution of claims under said letters patent."

This instrument bears the signatures and seals of Holbeck, Gottfried, and Stromberg. On the twenty-fifth day of June, 1878, Gottfried & Holbeck executed a further instrument in writing, by which they, on their part, revoked and countermanded the above-recited power of attorney given to Latrobe, "and all acts and things which shall or may be done by virtue thereof in any manner whatsoever."

It next appears that on the twenty-fourth day of February, 1879, the Barrel-Pitching Machine Company executed to Smith, Comegys, and Holbeck a new assignment of all the right, title, and interest of the company in and to the patent. The execution of the prior assignment by the company is mentioned in this one, and it is stated that the first instrument failed to meet the purposes and carry out the objects of the resolutions of the directors of the company, and it would seem that it was for that reason that this new assignment of February 24, 1879, which was duly executed by the Barrel-Pitch-

ing Machine Company, was made. Thereupon Smith and Comegys, respectively, executed new assignments to Holbeck, and on the fifteenth day of December, 1879, Stromberg, in consideration of the sum of \$5,000, assigned to Gottfried all his right, title, and interest in and to the patent, and in and to all claims of every kind or nature for past infringements, and all rights of action arising out of or connected with infringements. This instrument of assignment recited the fact that Stromberg had theretofore disposed of rights and licenses under the patent as a part owner under mesne assignments of the same, and had caused suits to be instituted against infringers, and that it was a part of the consideration of the assignment from him that he should be released from all claims which Gottfried or Holbeck or their assignees might or could have against him for or by reason of any collections theretofore made by him or his attorneys, or against any person or persons to whom he had granted licenses to use the patented improvements, and it was then declared as follows:

"Now, therefore, the said Matthew Gottfried and the said John F. T. Holbeck, the said Holbeck uniting herein for the purpose of carrying out the agreement aforesaid, for and in consideration of the premises, have released and by these presents do hereby release, the said John H. Stromberg from all claim that they, or either of them, might or could have against the said Stromberg for or by reason of any collection he may have made from parties to whom he or his attorneys * * * may have granted licenses to use the said patented improvement, hereby ratifying and confirming all such licenses *and all the acts of the said Stromberg and his attorneys in the premises.* And the said Matthew Gottfried doth hereby covenant and agree that he will save harmless the said Stromberg and his attorneys from all claims that may be made against them, or either of them, for or by reason of any interest which the said Gottfried & Holbeck, or either of them, may have given to any other party in the said letters patent."

It appears, also, that in September, 1873, Charles F. Smith brought a suit against Henry C. Comegys, in the superior court of Baltimore city, upon an indebtedness from Comegys to him, in which an attachment was issued and a seizure made of the shares of capital stock held by Comegys in the Barrel-Pitching Machine Company, which proceedings resulted in a judgment condemning the stock, according to the laws of the state of Maryland, for the satisfaction of Smith's claim, and on the twenty-seventh day of October, 1873, judgment was entered accordingly.

This, I believe is the history of the transactions between these various parties, and is therefore the history of the title of this patent.

Now, it is contended by the learned counsel for complainant that at the time Stromberg sold the machine in question to Miller he had no title which he could convey, and that no conveyance he could then make would enable Miller to use the machine without infringement of the patent. Further, that as the title to the patent in 1875 was vested in the Barrel-Pitching Machine Company, of Baltimore, Holbeck could not and did not by his agreement with Stromberg, convey to or vest in him any interest whatever in the patent.

It is also insisted that as the legal title did not pass from the Barrel-Pitching Machine Company to Holbeck, Smith, and Comegys by virtue of the conveyance made December 11, 1875, because of informality in the execution of that conveyance, Comegys, on the seventh day of June, 1876, had no title or interest which he could convey to Stromberg, and that Stromberg did not at any time have any title to or interest in this patent, and certainly none which enured to the benefit or for the protection of Miller, who had made his purchase long anterior to these transactions. It has been also argued that the title to the patent never passed out of the Barrel-Pitching Machine Company, so that it became vested as a legal title in Holbeck, Smith, and Comegys, until the second assignment from the company, made in February, 1879, and that Smith and Comegys then assigned their entire interest to Holbeck.

It is true that neither the assignment from Holbeck to Stromberg, nor that from Comegys to Stromberg, contained any express warranty of title, and I am inclined to the opinion that counsel for complainant is right in his contention that the legal title which Holbeck and Comegys subsequently acquired did not enure to the benefit of Stromberg. It is also probably true that, since the assignments from Holbeck to Stromberg and from Comegys to Stromberg did not contain an express warranty of title, no implied warranty could arise, because those assignments were not of the entire patent, but were only of the assignors' interest in the patent, whatever that might be. So that, standing upon strict legal principles applicable to after-acquired titles, it would seem there is force in the claim that the subsequent titles which Holbeck and Comegys acquired did not enure to the benefit of Stromberg. I think the court might be constrained so to hold if that were all there is of the case. It appears, however, that after the first assignment was made from the Barrel-Pitching Machine Company, which it may be admitted was

irregularly executed because it was signed only by Charles F. Smith, president, it was understood by the parties that the title had passed. They evidently proceeded to act upon that supposition; for, as we have seen, Smith at once made an assignment of his supposed interest to Gottfried & Holbeck, and Comegys assigned to Stromberg; and then Gottfried, Holbeck, and Stromberg entered into an agreement by which they declared that they were jointly interested in the patent, and agreed upon certain matters in which they declared themselves mutually interested, as fully stated in the agreement; so that it has seemed to me that the second assignment from the Barrel-Pitching Machine Company must be held to have been executed rather to correct what was understood at the time to be a technical defect in the execution of the first conveyance from that company than otherwise.

Now, upon this record we find that not only did these three parties, Holbeck, Gottfried, and Stromberg, in October, 1876, declare themselves to be jointly interested in this patent, but that in December, 1879, they united in the execution of an agreement by which Gottfried & Holbeck declared that they ratified and confirmed all the licenses to use the patented improvement which Stromberg had previously granted, *and all the acts of the said Stromberg*.

But it is argued in the brief of counsel that this had reference to the period when Stromberg was in fact a part owner of the patent. This, however, is not consistent with complainant's claim that Stromberg never was a part owner, and never had any interest in the patent. And in this connection it is a significant fact that if it be held that Stromberg acquired no interest from Comegys, after the execution of the first assignment from the Barrel-Pitching Machine Company, it seems to follow that Gottfried also acquired no interest at that time. Then the question arises, where must we look for the source of Gottfried's title? And in considering that question I have been unable to escape the conclusion that we must look for the source of his title, as he is now seeking to enforce rights against Miller, to the assignment which Stromberg executed to him in 1879; for if Stromberg took nothing from Comegys by the latter's assignment, executed June 7, 1876, then Gottfried took nothing from Smith by virtue of his assignment, executed December 11, 1875, both of which assignments were based on the first transfer from the Pitching Machine Company to Smith, Holbeck, and Comegys; and if all this be so, then the inquiry follows, must not Gottfried, as Stromberg's

grantee, be held privy to Stromberg's previous grant? It will be admitted, I think, that if Stromberg acquired a valid title to or interest in this patent, or a part of it, after his sale of the machine to Miller, he would not be permitted to turn about and sue Miller for infringing the patent by the use of the machine which he had himself sold to Miller. Suppose, for example, that at the time Stromberg made sale of the machine to Miller he had no title, but that afterwards he acquired an interest or title, would he be permitted then to prosecute a suit against Miller for infringement? I think not; and the point appears to be well made by counsel for defendant that, in a suit for infringement, the whole interest in the patent must be represented by the complainants in such suit; so that, if Stromberg had been in fact a part owner of this patent at the time the present suit against Miller was brought, he would have been a necessary party to the suit; and if Gottfried's present title has its source in the grant which Stromberg made to him in 1879, as appears to be the fact, then he is in the position of privy to Stromberg's prior grant, and can no more prosecute a suit against Stromberg's prior grantee than could Stromberg himself.

On the whole, therefore, while it may be technically correct to say that by the transfer from Holbeck to Stromberg and Comegys to Stromberg the latter did not acquire a perfect legal title, nevertheless, when we consider the fact that the complainant in this suit has once declared, in an agreement which he made with Stromberg, that the latter was jointly interested with him in the patent, and in a second agreement ratified and confirmed all licenses which Stromberg had previously granted to use the machine, *and all acts of Stromberg*; and when we consider that in suits which have been previously prosecuted in this court Stromberg was made a party thereto as jointly interested with Gottfried & Holbeck in the patent; and when we find further that if Stromberg acquired no interest in the patent by virtue of the transfer from Comegys to him after the first assignment from the Barrel-Pitching Machine Company to Smith, Holbeck, and Comegys, then Gottfried acquired no title by the transfer to himself and Holbeck from Smith, made December 11, 1875, and that Gottfried's present title has its source in the transfer to him from Stromberg in 1879,—it seems to me that the complainant is in a position where he is as much disabled from prosecuting Miller for infringement as Stromberg would himself be; and, considering the case in all its aspects, I am constrained to hold that the bill should be dismissed

for want of equity. Holbeck has passed out of the case. The bill has been heretofore voluntarily dismissed as to him, so that it is a controversy between Gottfried and Miller alone.

The attempted revocation by Gottfried in March, 1875, of the assignment of the patent which he had granted to Holbeck in December, 1870, cannot, I think, in view of all that subsequently occurred with the apparent acquiescence of Gottfried, be held to restore the latter's original title.

NOTE. The decree entered by the circuit court in pursuance of the above decision has been, at the present term of the supreme court of the United States, affirmed by that court.

HAMMERSCHLAG v. GARRETT and others.*

(Circuit Court, E. D. Pennsylvania. January 23, 1882.)

1. PROCESS—INFRINGEMENT.

In a patent for a process, every successive step enumerated in the claim must be regarded as an essential part, and must be employed by defendants, in order to render them liable to the charge of infringement.

2. MANUFACTURE OF WAXED PAPER.

The process of making waxed paper by machinery, patented in reissue No. 8,460, held not to cover all methods of making waxed paper by machinery, and not to be infringed by the manufacture of waxed paper according to a method which dispenses with some of the material steps in the process covered by such reissue.

Motion for an Attachment.

Upon a bill filed by complainant a final decree had been entered restraining respondents from infringing complainant's reissued letters patent No. 8,460, for improvement in waxing paper. Reported in 9 FED. REP. 43. Subsequently respondents constructed another machine for making waxed paper, whereupon complainants applied for an attachment, alleging that this latter machine was within the prohibition of the decree. The facts are sufficiently set forth in the opinion.

Frost & Coe and *John K. Valentine*, for complainants.

Collier & Bell, for respondents.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

BUTLER, D. J. Subsequently to the injunction in this case, the defendants constructed a machine corresponding to a section of the old Anderson machine, (the patent for which has expired,) and continued the manufacture of waxed paper by this means. The plaintiff, charging that the *process* thus employed infringes his, as described in the fifth claim of his patent, asks for an attachment to prevent its further use, and to punish the alleged disregard of his injunction. It is not charged that the machine is similar to the plaintiff's, and infringes the claims of his patent in this respect, but simply that his *process* is employed, in violation of the claim for this.

In passing upon the validity of the plaintiff's patent, and the construction of its several claims, we adopted the judgment of the circuit court for the southern district of New York, in *Hammerschlag v. Scamoni*, (involving the same patent,) [reported 7 FED. REP. 584,] for the sake of consistency and uniformity, without critical examination of the reasons on which the judgment was based. Whether the fifth claim, under consideration, is for a process, or simply for the combination of machinery previously described and claimed in separate parts, is a debatable question, which we did not, for the reasons stated, esteem it proper to enter upon. In the case cited it was decided to be for a process * * * consisting of successive steps, * * * four in number," as follows: *First*, "moving the paper over and in contact with a heated cylinder, which acts to spread the wax on the surface of the paper; *second*, heating the unwaxed surface to spread and fuse the wax into the fabric of the paper; *third*, removing the surplus wax; and, *fourth*, remelting and polishing the wax upon the surface,"—these several steps being performed "substantially as set forth" in the specifications. The plaintiff's present position, that this process covers all methods of making waxed paper by machinery, "and, therefore, whether or not the defendants carry on the making of waxed paper by machinery, by the complainant's particular method, or by a new mode devised by themselves, and which dispenses with some of the steps used by the plaintiff in his particular mode, makes no difference whatever as regards infringement," cannot be adopted. It is clearly unsound. His invention, as described by himself and in his own language, is "for an improvement relating to a *means* for heating the wax and *applying it to the paper, removing the surplus wax, and polishing the surface*,"—which "improved means" are particularly described in the specifications and embraced in the claims,—the fifth of which reads as follows:

"The method herein set forth of making waxed paper, consisting of spreading the wax upon the surface; heating the paper from the opposite side to spread the wax into the fabric of the paper; removing the surplus wax, and remelting and polishing the wax upon the paper,—substantially as set forth."

Construing this claim to be one for a process, as has been done, every successive step enumerated, must be regarded as an essential part, and must be employed by the defendants to render them liable to the charge of infringement. The first ("spreading the wax upon the surface of the paper substantially as set forth") certainly is not employed by the defendants. The paper is not "moved over and in connection with the heated cylinder which acts to spread the wax" upon it; nor is the wax spread upon it by any similar or equivalent means. It is not, indeed, in the sense here contemplated, spread upon it at all. The paper is simply dipped into the wax and as much of this substance taken up as will adhere,—not upon one side simply, but upon both. This omission of the first step in the plaintiff's process, plainly distinguishes the defendants' from it. That such omission would have such effect seemed to be fully conceded on the argument for injunction, by the plaintiff's expert and his counsel. In speaking of the Anderson patent, then set up in anticipation, this witness said:

"The mode of operation there is different, being that of submerging the fabric or a portion thereof in the liquid, on its way through the machine. The Anderson machine does not contain the same subject-matter of the first claim, because it has no heated cylinder revolving within the trough containing wax, and acting to heat the same and apply it to the paper. For the same reason it does not contain the method specified in the second claim, the first step of which consists in transferring the melted wax from the trough to the paper by a roller or cylinder. For the same reason it does not contain the combination specified in the third claim, and for the additional reason, that it contains no means, after the wax has been applied to one surface of the paper, for heating it at the other surface to draw the wax in. *Finally, it does not contain, for the same reason, the method claimed in the fifth claim.*"

That this witness may now express a different opinion is not important. The plaintiff's counsel, in distinguishing the Anderson machine from the plaintiff's, adopted and enforced the same view. That it was also adopted by the distinguished judge whose leading we followed in granting the injunction, is rendered clear by what he said in disposing of the motion for attachment against Scamoni, on September 27, 1881. We quote his language:

"In regard to the Van Skelline machine, there is not in it any such heated cylinder as the cylinder *a* of claim 1 of No. 8,460, or as the cylinder *C* of the defendant. It does not anticipate claim 2 of No. 8,460, because not only is there not in it a roller which transfers the melted wax from the trough to the paper, but there is no scraper between the roller and the paper. It does not meet claim 3 of No. 8,460, because it has no heated cylinder like the heated cylinder *a*; nor does it meet claim 5 of No. 8,460. The operation of spreading the wax upon the surface of the paper, substantially as set forth in the description of No. 8,460, involves spreading it by means of a uniform layer of wax on the spreading-cylinder, produced by a scraper applied to such cylinder between the trough and the place of contact with the paper, which removes from the cylinder the surplus wax taken up by it from the trough. In Van Skelline's machine the paper is dipped into the bath of wax and takes up all the wax it will, and then the scraper is applied to the paper. The defendant's process imitates the plaintiff's, and not Van Skelline's."

As respects the question before us, the operation of the defendants' machine, and his process, are precisely similar to Van Skelline's. This view is also fully sustained by the testimony of the several experts called by the defendants,—some of whom are men of very great experience and unusual intelligence, respecting the matters of which they speak.

It is unnecessary to inquire whether the defendants employ or imitate other steps of the plaintiff's process. What we have said is sufficient to indicate our reasons for holding that they do not employ the process protected by his patent.

The motion must therefore be refused.

McKENNAN, C. J., concurred.

THE DE SMET.*

(Circuit Court, E. D. Louisiana. December 29, 1881.)

1. RANK OF LIENS AND MORTGAGES UPON VESSELS—REV. ST. § 4192—ADMIRALTY RULE No. 12.

Section 4192 of the Revised Statutes, relative to the recording of conveyances and mortgages on vessels, gives no lien or other priority to mortgages and conveyances than they had before the act was passed, except to recorded conveyances and mortgages, over mortgages and conveyances not recorded, in certain cases. It affects mortgages and conveyances of vessels as the various registry acts of the states affect conveyances and mortgages of lands. And as, prior to this recording law, liens, whether maritime or domestic, under the maritime law or under the state law, had priority over mortgages, so now they should have priority.

The John T. Moore, 3 Woods, 61, criticised.

2. SAME—STARE DECISIS.

But frequent decisions in the fifth circuit having held the contrary, the doctrine of *stare decisis* must govern in this case, and it is now *held*, in conformity therewith, that "the lien of a mortgage on a vessel, duly recorded according to section 4192, Rev. St., is inferior to all strictly maritime liens, but is superior to any subsequent lien for supplies furnished in the home port, given by state legislation."

Baldwin v. The Bradish Johnson, 3 Woods, 582, followed.

In Admiralty.

Chas. B. Singleton and *R. H. Brown*, for mortgagees.

Richard De Gray, *Chas. S. Rice*, *Henry I. Leroy*, *E. B. Kouttschuidt*, *J. H. Kennard*, *W. W. Howe*, and *S. S. Prentiss*, *contra*, for various creditors of the boat.

PARDEE, C. J. The question presented in this case is as to the priority of certain lienholders on funds (proceeds of the sale of the *De Smet*) in the registry of the court. The appellee claims the funds under a mortgage duly recorded according to the act of congress in that behalf, and bearing date of January 24, 1880. The appellants claim under liens and privileges granted the furnishers of supplies and material-men in the home port by the laws of the state of Louisiana, some of prior and some of later date than the mortgage of appellee. Since the adoption of the constitution of Louisiana, of 1879, such liens and privileges do not require to be recorded in order to rank prior mortgages, or to be valid against third persons. See article 177, Const. La. 1879. And the twelfth admiralty rule has not been changed since 1872. So that the questions upon which the *Lottawanna Case*, 21 Wall. 580, was decided cannot be made in this case,

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

and we are without any decision of the supreme court to guide us in the matter. The decisions of the various circuit and district courts reported, in which the precise question of this case has been answered, are very numerous, and as conflicting as the testimony of witnesses in a collision case. In this circuit, the rule followed by the district judge in this case, in favor of the recorded mortgage, has prevailed since 1877. It may, therefore, be set down as an open question, in the country at large, to remain so until the supreme court shall finally settle it.

The whole question seems to turn upon the effect to be given to section 4192 of the Revised Statutes of the United States, which declares that—

“No bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage, by a loan of money, or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section.”

The question is, does this section create a lien in favor of a mortgage recorded according to its provisions? The language of the section is in the negative form. If put in the affirmative form, on the theory of its creating liens or granting rights, then the following three propositions comprise the whole substance, as far as said section declares liens or rank of liens:

(1) Bottomry liens, etc., shall not be affected by recordation or non-recordation.

(2) A recorded conveyance or mortgage, etc., shall be valid against all persons.

(3) An unrecorded conveyance or mortgage shall be valid against the grantor or mortgagor, his heirs and devisees, and persons having actual notice.

It ought to follow, then, that if this section gives a lien to recorded mortgages, it gives one also, though of a limited scope, to unrecorded mortgages. And as liens created by congress are superior in rank to state liens, it follows that an unrecorded mortgage has priority over state liens.

Again, considering from the lien hypothesis, the lien given by section 4192 to a recorded mortgage ranks the lien given by state laws to material-men. The lien given to material-men by state laws

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ranks unrecorded mortgages, which latter have no United States lien. An unrecorded mortgage ranks a recorded mortgage when the holder of the latter has actual notice of the unrecorded mortgage.

Now let us take a case where there is an unrecorded mortgage, a subsequent recorded mortgage, where the mortgagee and holder has actual notice of the first mortgage, and a lien, under the state law, for a material-man; and this is the actual state of facts in the case of *The John T. Moore*, 3 Woods, 61. In that case, Judge Woods, who maintains that section 4192 gives a lien to a recorded mortgage, says:

"This fact of notice gives the mortgage to Swift's Iron & Steel Works and Long (unrecorded) precedence over the mortgage (recorded) of John T. Moore & Co., and entitles it to priority of payment over all the claims, even though, as between the mortgage to Swift's Iron & Steel Works and Long, and claims inferior to the mortgage of John T. Moore & Co., the latter would be entitled to priority if the mortgage of John T. Moore & Co. were out of the case."

It would seem to have been just as logical to have said: As the mortgage of John T. Moore & Co. was duly recorded, it has precedence over the lien given by the state law to W. G. Coyle & Co. for supplies, and is entitled to priority of payment over all the claims, even though, as between the mortgage of John T. Moore & Co. and claims inferior to the state lien, the latter would be entitled to priority were the state lien to Coyle & Co. out of the case. Or to have said: As the state lien given to Coyle & Co. has precedence over the unrecorded mortgage of the Swift Iron Works, it is entitled to priority of payment over all the claims, even though, as between the state lien to Coyle & Co. and claims inferior to the Swift Iron Works mortgage, the latter would be entitled to priority were the mortgage to the Swift Iron Works out of the case.

It is true that Judge Woods follows two Ohio cases, *Brazee v. Lancaster Bank*, 14 Ohio, 318, and *Holliday v. Franklin Bank of Columbus*, 16 Ohio, 533, but there, where the controversy was between judgment liens and mortgages, the court arbitrarily cut the knot by deciding that each lien should prevail according to its age. That Ohio court says:

"The first-named proposition is known to the profession as the triangular question," and "if it be attempted to settle the question on the principle of superiority, it runs in a circle and produces no result."

And it is also true that if the dilemma exists as Judge Woods found it in the *John T. Moore Case*, his method of extrication, following the Ohio cases, may be right; but a construction of a statute

that produces such results should be avoided if possible. But there is a further inconsistency resulting from the construction claimed, and it is shown also in the *John T. Moore Case*. This decision, which declares that the law of congress that—

“No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, *shall be valid* against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled,” etc.

—Is valid and must be enforced, concludes by actually enforcing an unrecorded mortgage of a vessel against third persons without notice, in the direct face of the statute, for it gives priority to an unrecorded mortgage over lienholders without notice.

And there is another consideration. If the said section 4192 gives a lien to recorded mortgages, recorded according to its provisions, does it not give a lien, if not an absolute title, to conveyances recorded according to its provisions? And under it cannot a devisee, by a duly-recorded conveyance, deny all supplies and materials furnished the boat in the home port, and in that way defeat the state lien entirely?

As to the admiralty rules of the supreme court which control proceedings in admiralty, referred to, it is true they affect remedies and not rights. Yet under the twelfth rule, as it existed prior to 1859 and as it now is, a lien under the local law for materials and supplies may be enforced in admiralty by proceedings *in rem*. Is it possible that after such a lien is enforced a mortgage creditor, who has no standing in court but for remnants, can step in and receive all the proceeds? And if the act of congress gives a lien to a mortgage recorded according to its provisions, what is the rank of that lien? Who can say that it is not a better lien than subsequent admitted maritime liens?

It seems that the theory of a lien being given by section 4192 to a recorded mortgage is destructive of all principles in regard to liens, whether maritime or domestic. Liens are founded on necessity; “to give credit to the ship;” “to furnish wings and legs;” and “because ships are built to plow the seas and not to rot at wharves.”

The foregoing considerations, and the arguments presented in the many cases bearing on this question that I have examined, drive me to the conclusion that the said section 4192, in relation to the recording of conveyances and mortgages on ships, gives no lien or other

priority to mortgages and conveyances than they had before the act was passed, except to recorded conveyances and mortgages over mortgages and conveyances not recorded in certain cases. It affects mortgages and conveyances on ships as the various registry acts of the states affect conveyances and mortgages of lands and chattels; as a registration law affects the rights of voters. In other words, it gives no new rights; it preserves rights already acquired. It is a law that requires owners and mortgagees of ships to advertise their claims; to give notice (constructive) to all the world of their demands; but in a conflict of rights the owner must stand on his conveyance, the mortgagee on his mortgage. And as, prior to this recording law, liens, whether maritime or domestic, under the maritime law or under the state law, had priority over mortgages, so now they have priority. These being my views of the law applicable, my duty in the premises as to the proper judgment to render in this case would seem plain.

But there is another and a very important matter to consider. The rule that has been adopted, and has prevailed for some years in this judicial circuit, is at variance with my views and conclusions.

My learned predecessor, who now occupies a seat on the supreme bench and holds the highest judicial position in this circuit, established and doubtless still maintains the rule that mortgages duly recorded in pursuance of the act of congress are entitled to priority over domestic liens of subsequent date granted by the state law. I do not refer to the *John T. Moore Case*, reported in 3 Woods, 61, for I do not dispute the correctness of the judgment in that case, though I have criticised it somewhat herein. But in the *Bradish Johnson Case*, reported in the same volume, page 582, the rule is clearly laid down, and its propriety is maintained with the learning and force so characteristic of that eminent judge. Since that decision—1877—the rule there laid down has been the law in this circuit. The eminent admiralty judges in this circuit, notably in Mississippi and this state, have indorsed the decision, and followed it in determining the rights of parties in many cases, and I am now confronted with *stare decisis*. Upon this, Chancellor Kent says, (1 Kent, Comm. 475:)

“If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. * * * If judicial decisions were to be lightly disregarded we

should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise it would be leaving us in a state of perplexing uncertainty as to the law."

And upon *stare decisis* Judge Cooley says, (see Const. Lim. 51:)

"The doctrine of *stare decisis*, however, is only applicable, in its full force, within the territorial jurisdiction of the courts making the decisions, since there alone can such decisions be regarded as having established any rules."

And further:

"It will, of course, sometimes happen that a court will find a former decision so unfounded in law, so unreasonable in its deductions, or so mischievous in its consequences, as to feel compelled to disregard it. Before doing so, however, it will be well to consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by any change; for, in such a case, it may be better the correction of the error be left to the legislature, which can control its action so as to make it prospective only, and thus prevent unjust consequences."

There can be no doubt that, since the *Bradish Johnson Case*, if not before that time, business men in this circuit have had the right to consider the rule laid down in that case as the law of this circuit, and no doubt many rights have been acquired under such view of the law.

In argument, the opposite doctrine has been most ably maintained, and I have been eloquently urged to recognize the true principles that ought to prevail, and thus settle the rule in this circuit on a firm foundation; but, unfortunately, my views tend to unsettle, rather than settle, the rule; and, were I to give them full effect, no one in this circuit could tell whether domestic lien or mortgage were better until he ascertained whether the circuit justice or the circuit judge would try his case on appeal.

My duty, then, is to subordinate my views to those of the learned circuit justice, and follow the doctrine of *stare decisis*, leaving to the court of appeal or review, as suggested by Kent, or the legislature, as suggested by Cooley, the business of correcting the error, if any there be.

The judgment of the district court, then, should be affirmed.

Let a decree in proper terms, and to that effect, be entered, with costs against appellants.

NOTE.

The fundamental principle of the maritime law is that a ship is made to plow the sea, and not to rot by the wall, and its chief object, both in the creation of maritime liens and the determination of their priority with respect to each other, so far as contracts are concerned, is to give the ship credit in whatever port she may be. A maritime lien is allowed merely to afford the means of procuring necessary services, supplies, or materials in a port where they cannot be obtained on the personal responsibility of the master or owner. It is manifest that this policy of giving credit to the ship requires that the lien shall attach to the whole ship and not to a part of it, and bind all the interests that then center in the ship, whether proprietary or in the nature of prior liens.(a) A maritime lien, however, may arise from a tort as well as from a contract. The principle of the maritime law in regard to marine torts is that the ship is regarded as the offender, and as such is liable to the party grieved, and in order that his remedy may be efficient he is allowed a lien, not merely on the interest of the owner, but on the entire ship.(b) There is, therefore, no difference between a lien arising from a tort and a lien arising from a contract. In either case the lien from its very nature binds the ship and all prior interests therein, for that is the essential character of a maritime lien. It attaches to the *res* itself, and not to the interest of any particular person in the *res*. Hence a maritime lien is entitled to priority over an antecedent maritime lien, and if the ship is insufficient to meet all the liens, they are paid in the inverse order of their creation.(c)

A few examples will illustrate the proposition and make it clearer. A lien for salvage is commonly said to take rank prior to all other liens, because the salvage service is usually the last rendered to the ship, and the efficient cause of preserving the interests of all other claimants; but it is postponed to a lien for services(d) or materials(e) rendered or supplied after the salvage. It is commonly said that seamen are the favorites of a court of admiralty, and that their wages are nailed to the last plank of the ship; yet their lien for wages due at the time of a collision is postponed to a lien for damages arising from the collision.(f) As between different bottomry bonds, the last bond is entitled to priority over an antecedent bond.(g) A maritime lien for repairs is entitled to priority over an antecedent bottomry bond.(h) As between materialmen, those who furnish materials at a later stage of the voyage are entitled to priority over those who furnished materials at an earlier stage of the voyage.(i) As between two parties who sustain a loss by collision at differ-

(a) *The Hope*, 1 Asp. M. L. Cas. 563; S. C. 23 L. T. (N. S.) 287; *The America*, 16 Law Rep. 264; *The Globe*, 2 Blutchf. 427.

(b) *The America*, 16 Law Rep. 264; *The Frank G. Fowler*, 8 Fed. Rep. 331.

(c) *The Hope*, 1 Asp. M. L. Cas. 563; S. C. 23 L. T. (N. S.) 287; *The Athenian*, 3 Fed. Rep. 248.

(d) *The Selina*, 2 Notes of Cases, 18; *Dalstrom v. The E. M. Davidson*, 1 Fed. Rep. 259.

(e) *Collins v. The Fort Wayne*, 1 Bond, 476.

(f) *The Enterprise*, 1 Lowell, 455; *The Linda Flor*, Swab. 309; *The Benares*, 7 Notes of Cases, Supp. 53.

(g) *The Sydney Cove*, 2 Dod. 1; *Furniss v. The Magoun*, Olc. 55; *The Constanca*, 4 Notes of Cases, 285; S. C. 10 Jur. 845.

(h) *The Jerusalem*, 2 Gall. 345.

(i) *The Omer*, 2 Hughes, 96; *Hatton v. The Melita*, 3 Hughes, 494.

ent times, the one whose loss happened last is entitled to priority over the one whose loss happened first.(j)

The reason for the rule that maritime liens are entitled to priority in the inverse order in which they attach, is that in the case of contracts the benefit rendered at the latest hour preserves the *res* to satisfy the earlier claims, and thereby earns a superior equity in respect to the common fund. It is manifest that cases which are not within the reason of the rule are not within the rule, and in determining whether the rule applies or not, time is not the only element to be considered.(k) There are several well-established cases where classes of lienholders, as between themselves, share *pari passu*; as, for instance, seamen who ship for the same voyage, salvors who are engaged in the same salvage service, men who furnish materials(l) or supplies(m) for the same voyage, freighters who claim under bills of lading for the same voyage,(n) holders of bottomry bonds who act in concert with each other in making advances for repairs at the same time and place,(o) and parties who sustain a loss by the same collision.(p) These cases show that the rule contemplates not merely the date but the voyage. Mere subsequence in time does not give a right to priority of payment, unless one lienholder has been more efficacious than the other in preserving the ship and bringing it to its final destination.

This equality of payment in certain cases has made it convenient to divide maritime liens into classes which are said to have a certain rank of privilege. When the liens all hold the same rank, if the property is not sufficient to pay all in full, they are paid concurrently, each in proportion to its amount.(q) When the liens hold different ranks, then those which occupy the first rank must be paid in full before any allowance can be made to those which hold an inferior grade.(r) A careful consideration of this division of liens into classes will show that it is founded in part upon the stage of the voyage at which the service is rendered, and in part upon the efficiency of the service to speed the ship on its course. Some maritime liens, considered by themselves, hold the same privilege,—as, for instance, pilotage, towage, and liens for materials; but because one is necessarily rendered at a later stage of the voyage than the other, it is entitled to priority over the other.(s) Other maritime liens, which are allowed for other reasons than that of giving credit to the ship,—such, for instance, as the lien of freighters(t) or insurers,(u)—have no tendency to expedite the voyage or preserve the ship, and therefore take a low rank. An examination of the various classes of maritime liens, and the relative rank held by each, will illustrate these principles and show how they are applied to the ever-varying phases of litigation.

COSTS. The costs of the libellant in prosecuting the suit so as to obtain a condemnation and sale of the ship are entitled to priority over all other claims,

(j) *The Frank G. Fowler*, 8 Fed. Rep. 331.

(k) *The William T. Graves*, 14 Blatchf. 169; 3 O. S. Ben. 368.

(l) *The America*, 16 Law Rep. 264; *The Fanny*, 2 Low. 508; *The Superior*, Newb. 176.

(m) *The William F. Safford*, Lush. 69.

(n) *The Paragon*, 1 Ware, 322.

(o) *The Exeter*, 1 O. Rob. 173; *The Constancia*, 4 Notes of Cases, 285; 3 O. C. 10 Jur. 845.

(p) *The Desdemona*, Swab. 158.

(q) *The Paragon*, 1 Ware, 322; *The Superior*, Newb. 176.

(r) *The Paragon*, 1 Ware, 322; *The Superior*, Newb. 176.

(s) *Porter v. The Sea Witch*, 3 Woods, 75; *The City of Tawas*, 3 Fed. Rep. 170.

(t) *The Unadilla*, 2 Mich. Law, 441.

(u) *The Dolphin*, 1 Philp. 530.

for the suit is the means by which the ship is converted into money, and all persons who intervene to claim the proceeds are not equitably entitled to any more than the balance that remains after paying the expenses of the suit.(v) Parties who file intervening petitions are not entitled to have their costs paid out of the fund, when the liens which outrank them are sufficient to absorb it. The rule, therefore, is that the costs of the libellant are paid first, then the liens which are entitled to priority, then the costs of the intervening petitioner, who stands next in rank, then the liens which are next in rank, and so on; the intervening petitioner who holds the lowest rank not being entitled to his costs until all the liens and costs incident thereto which outrank him have been fully paid.(w) If in any case the whole proceeds of the sale are not sufficient to pay the costs of the libellant, then they must be divided among all the officers *pro rata*, for all the expenses of justice naturally stand in the same rank.(x)

SALVAGE. Salvage is entitled to priority over all antecedent liens on the ship, for it is a service by which all prior rights are saved. Hence, it outranks the lien of seamen for wages earned before the rendition of the salvage service.(y) But if the seamen, instead of abandoning the ship, stay by it, and aid in saving whatever is saved, then they are entitled to priority over the salvors; for the salvage service rendered by them gives efficacy to their claim for wages, and nails their lien to the last plank.(z) If seamen render services after a salvage service, their lien for such subsequent wages has priority over the lien for salvage.(a) If a party furnishes materials to,(b) or takes a bottomry bond on,(c) the ship after the rendition of salvage service, he is for the same reason entitled to priority over the salvage.

SEAMEN'S WAGES. Seamen are commonly called the wards of the admiralty, and their claims for wages are carefully and zealously protected on account of their poverty and the hardships they endure. Their lien for their wages for the current voyage is entitled to priority over all antecedent liens, and all liens incurred during the voyage, except salvage, because their labor preserves the common pledge for the benefit of all. Inasmuch as they bring the ship to its final destination, their lien is the last to attach, and therefore for that reason the first to be paid. It takes priority over the antecedent liens of materialmen,(d) freighters,(e) holders of bottomry bonds,(f) holders of claims for tow-

(v) *The Paragon*, 1 Ware, 322; *The John T. Moore*, 3 Woods, 61; *The Kate Hinchman*, 6 Biss. 367; *The Rodney*, Bl. & H. 226; *The Fanny*, 2 Low. 608; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236; *The City of Tawas*, 3 Fed. Rep. 170; *The Panthea*, 25 L. T. (N. S.) 389; S. C. 1 Asp. M. L. Cas. 133.

(w) *The Rodney*, Bl. & H. 221; *The Kate Hinchman*, 6 Biss. 367; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236.

(x) *The Phebe*, 1 Ware, 354.

(y) *The Selina*, 2 Notes of Cases, 18; *The Panthea*, 1 Asp. M. L. Cas. 133; S. C. 25 L. T. (N. S.) 389; *The Gustav*, Lush. 506; *The Sabina*, 7 Jur. 182; *The Athenian*, 3 Fed. Rep. 248; *Collins v. The Fort Wayne*, 1 Bond, 476.

(z) *Dalstrom v. The E. M. Davidson*, 1 Fed. Rep. 259.

(a) *The Selina*, 2 Notes of Cases, 18.

(b) *Collins v. The Fort Wayne*, 1 Bond, 476.

(c) *The Selina*, 2 Notes of Cases, 18.

(d) *The Superior*, Newb. 176; *The America*, Id. 195; *The Rodney*, 1 Bl. & H. 226; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236; *Logan v. The Aeolian*, 1 Bond, 267; *Collins v. The Fort Wayne*, Id. 476; *Hatton v. The Melita*, 3 Hughes, 494.

(e) *The Paragon*, 1 Ware, 322; *Hatton v. The Melita*, 3 Hughes, 494; *The Leonidas*, Olc. 12.

(f) *The Virgin*, 8 Pet. 538; *The Hilarity*, 1 Bl. & H. 90; *The Madonna D'Idra*, 1 Dod. 37; *The Favorite*, 2 C. Rob. 232; *Farniss v. The Magoun*, Olc. 55; *The Kammerhevie Rosenkrantz*, 1 Hagg. 62; *The William F. Safford*, Lush. 69.

age,(g) mortgagees,(h) claimants for damages arising from a collision,(i) and a consignee claiming for disbursements made for light money, pilotage, and port duties.(j) The phrase "current voyage" means the voyage for which the seamen ship, so that if it consists of several parts, as, for instance, an outward and a homeward voyage, the lien for wages earned in any part of the voyage is entitled to priority over a lien incurred in a later state of the voyage.(k) The rule which limits the priority of seamen to wages for the current voyage is not deemed to be applicable to coasting voyages, or voyages on the lakes, where the trips are short, and the seamen are engaged not for a determinate voyage, but for an indefinite time, or some limited period. In such cases the right to priority is extended to what is called the season instead of the voyage.(l)

PILOTAGE, TOWAGE, AND WHARFAGE. So far as mere rank is concerned, claims for pilotage, towage, and wharfage hold the same rank as claims for necessary materials and supplies.(m) They are, therefore, entitled to priority over antecedent claims for supplies(n) and repairs(o) and antecedent bottomry bonds.(p) As between claims for services rendered at different dates, the last in point of time is entitled to priority over those that are first.(q)

MATERIALS AND SUPPLIES. The lien for necessary materials or supplies is entitled to priority over antecedent claims for salvage,(r) antecedent bottomry bonds,(s) and an antecedent claim for disbursements for light money, pilotage, towage, and port duties.(t) When they are furnished at the same time and place for the same voyage, they share *pari passu*.(u) On the lakes the custom seems to be established to treat those that are furnished during the same season as if they were furnished for the same voyage.(v) But in general those that are furnished at the latest stage of the voyage are entitled to priority over those that are furnished at an earlier stage.(w)

BOTTOMRY BONDS. A bottomry bond is entitled to priority over an antecedent lien for salvage(x) or supplies(y) or a collision,(z) an antecedent mortgage.(a) and the lien of a freighter whose goods have been sold and the proceeds applied to make repairs on the ship.(b) As between different bottomry

(g) *The City of Tawas*, 3 Fed. Rep. 170; *The Athenian*, Id. 248.

(h) *The City of Tawas*, 3 Fed. Rep. 170; *The John T. Moore*, Woods, 61; *Miller v. The Alice Getty*, 9 C. L. N. 315; *The Island City*, 1 Low. 375.

(i) *Rusk v. The Freestone*, 2 Bond, 234; *The America*, 16 Law Rep. 264.

(j) *The Rodney*, 1 Bl. & H. 226; *The St. Lawrence*, 5 Prob. Div. 250.

(k) *The Sidney Cove*, 2 Dod. 13; *The Union*, Lush. 122; *The America*, 16 Law Rep. 264; *The Louisa Bertha*, 1 Eng. L. & Eq. 665; *Vide The Mary Ann*, 9 Jur. 94; *The Janet Wilson*, Swab. 261.

(l) *The Paragon*, 1 Ware, 322; *The City of Tawas*, 3 Fed. Rep. 170; *The America*, 16 Law Rep. 264.

(m) *Porter v. The Sea Witch*, 3 Woods, 75; *The City of Tawas*, 3 Fed. Rep. 170; *The St. Lawrence*, 5 Prob. Div. 250.

(n) *Porter v. The Sea Witch*, 3 Woods, 75; *The Wexford*, 7 Fed. Rep. 674.

(o) *The Island of Tawas*, 3 Fed. Rep. 170.

(p) *The St. Lawrence*, 5 Prob. Div. 250.

(q) *The Athenian*, 3 Fed. Rep. 248.

(r) *Collins v. The Fort Wayne*, 1 Bond, 476.

(s) *The Jerusalem*, 2 Gall. 345.

(t) *The Rodney*, 1 Bl. & H. 226.

(u) *The William F. Safford*, Lush. 69; *The Fanny*, 2 Low. 503.

(v) *The Superior*, Newb. 176; *The America*, 16 Law Rep. 264; *Collins v. The Fort Wayne*, 1 Bond, 476; *The City of Tawas*, 3 Fed. Rep. 170; *The Athenian*, Id. 248.

(w) *The Fanny*, 2 Low. 503; *The Omer*, 1 Hughes, 96; *The Melita*, 3 Hughes, 494.

(x) *The Selina*, 2 Notes of Cases, 86.

(y) *The William F. Safford*, Lush. 69.

(z) *The Aline*, 1 W. Rob. 111.

(a) *Furniss v. The Magoun*, Olc. 12; *The Mary*, 1 Paine, 671; *The Duke of Bedford*, 2 Hagg. 294.

(b) *The Constancia*, 4 Notes of Cases, 285; S. C. 10 Jur. 815.

bonds the last is entitled to priority over the first.(c) This principle applies even as between different bonds executed at the same place and for the same voyage, if the last was needed to complete repairs begun with the money raised under the first.(d) But it is not entitled to such priority unless it was executed under the pressure of a necessity,(e) and the right may be lost if there is an agreement to postpone the payment until after the termination of a subsequent voyage.(f) If several parties act in privity and concert with each other at the same place to make advances for the same repairs, then the bottomry bonds taken by them are entitled to share *pro rata*, although they bear different dates.(g)

COLLISION. So far as mere rank is concerned, the lien for damages arising from a collision holds the same rank as a lien for necessary supplies or material,(h) and is entitled to priority over antecedent liens existing at the time when the damage was done. It therefore takes precedence of an antecedent lien for seamen's wages,(i) or necessary materials or supplies,(j) an antecedent bottomry bond,(k) an antecedent mortgage,(l) and a lien for an antecedent collision.(m) Like other maritime liens it is outranked by a subsequent lien for seamen's wages,(n) or a subsequent bottomry bond.(o)

FREIGHTERS. The lien arising from a contract of affreightment holds a rank inferior to that of other maritime liens incurred during the voyage, such as towage and necessary repairs, because they are incurred for the direct benefit and preservation of the ship itself,(p) but it is entitled to priority over maritime liens incurred during a previous voyage.(q) for in this respect it has that quality which is characteristic of all maritime liens. If the goods of a freighter are sold during the voyage in order to procure necessary supplies or repairs, then his lien is entitled to priority over all antecedent liens, whether they consist of mortgages,(r) bottomry bonds,(s) or liens for necessary materials and supplies.(t)

INSURANCE. The lien of an insurer for unpaid premiums holds the lowest rank among maritime liens.(u)

SHIPWRIGHT. A shipwright may at common law detain the ship until his demand is paid. This right of detention is called a lien at common law. The characteristic of a lien at common law, as distinguished from a maritime lien, is that it is subject to all prior liens. Hence the lien of a shipwright at common law is postponed to all prior maritime liens, but is entitled to priority over all liens that accrue while the ship is in the yard, even though they are maritime.(v)

(c) *The Sydney Cove*, 2 Dod. 1; *Furniss v. The Magoun*, Olc. 55; *The Constancia*, 4 Notes of Cases, 285; S. C. 10 Jur. 845.

(d) *The Betsy*, 1 Dod. 289.

(e) *The Rhadamanth*, 1 Dod. 201.

(f) *The Royal Arch*, Swab. 269.

(g) *The Exeter*, 1 C. Rob. 173; *The Constancia*, 4 Notes of Cases, 285; S. C. 10 Jur. 845.

(h) *The America*, 16 Law Rep. 264.

(i) *The Benares*, 7 Notes of Cases, Supp. 53; *The Duna*, 13 Ir. Jur. 358; *The Linda Flor*, Swab. 309; *The Enterprise*, 1 Low. 465; *Rusk v. The Freestone*, 2 Bond, 234.

(j) *The America*, 16 Law Rep. 264; *Rusk v. The Freestone*, 2 Bond, 234.

(k) *The Aline*, 1 W. Rob. 111; *Force v. The Pride of the Ocean*, 3 Fed. Rep. 162.

(l) *The Aline*, 1 W. Rob. 111.

(m) *The Frank G. Fowler*, 8 Fed. Rep. 331.

(n) *Rusk v. The Freestone*, 2 Bond, 234.

(o) *The Aline*, 1 W. Rob. 111.

(p) *The Unadilla*, 2 Mich. Law, 441.

(q) *Hatton v. The Melita*, 3 Hughes, 394.

(r) *Justi Pon v. The Arbusti*, 6 A. L. Reg. 511; *The E. M. McChesney*, 8 Ben. 150.

(s) *The Salacia*, 32 L. J. Adm. 43.

(t) *The Grapeshot*, 2 Ben. 527.

(u) *The Dolphin*, 1 Flippin, 580. Vide the *John T. Moore*, 3 Wood. 61.

(v) *The Gustav*, Lush. 506.

LIENS UNDER STATE LAWS. A lien arising under a state law is postponed to all maritime liens, whether they accrue before or after the attaching of a lien under the state law, for no state has the power to interfere with, supersede, or destroy a lien that accrues under the maritime law.^(w) When a lien arising under a state law is enforced in admiralty, it is enforced subject to all the qualifications and limitations imposed upon it by the state law. Hence, the relative rank of these liens with respect to each other depends upon the state law,^(x) but the general tendency, in the absence of an express provision in the state law, is to allow them to share *pro rata*.^(y)

MORTGAGES UNDER THE MARITIME LAW. A mortgage is a lien that derives its force, not from the maritime law, but from the contract of the parties, and depends for its efficacy upon the principles of the common law. Hence, like all other liens at common law, it is subject to all prior liens, whether they consist of liens for necessary materials or supplies,^(z) or of bottomry bonds,^(a) or of liens under state laws.^(b) As soon as the mortgage is executed the mortgagee is ordinarily entitled to the possession of the ship. If he leaves it in the possession and control of the mortgagor, he thereby consents that it shall be subject to all liens which may be contracted or incurred by the mortgagor in the course of its employment. For the purpose of subjecting it to subsequent liens, the mortgagor is deemed to act with the consent and authority of the mortgagee. Hence the lien of the mortgage is postponed to subsequent liens, whether they consist of liens for salvage,^(c) or seamen's wages,^(d) or necessary supplies or materials,^(e) or collisions,^(f) or affreightments,^(g) or bottomry bonds,^(h) or the lien of a shipwright at common law,⁽ⁱ⁾ or liens under state laws.^(j)

MORTGAGE UNDER REGISTRATION ACTS. Section 4192 of the Revised Statutes of the United States is limited to vessels of the United States; hence it does not apply to vessels which have not been either registered or enrolled,^(k)

(w) *The Superior*, Newb. 176; *The St. Joseph*, 1 Brown, Adm. 202; *The Harrison*, 2 Abb. C. C. 74; S. C. 1 Sawy. 353; *The Favorite*, 3 Sawy. 405; *The City of Tawas*, 3 Fed. Rep. 170; *The John T. Moore*, 3 Woods, 61; *Scott's Case*, 1 Abb. C. C. 336; *The E. A. Barnard*, 2 Fed. Rep. 712; *The Athenian*, 3 Fed. Rep. 248; *Collins v. The Fort Wayne*, 1 Ben. 476. Contra, *The General Burnside*, 3 F. d. Rep. 228; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236.

(x) *Srodes v. The Collier*, 9 Pitts' Law J. 73, 193; *The Fanny*, 2 Low. 608.

(y) *The Superior*, Newb. 176; *The Kate Hincman*, 6 Biss. 367; *The Skylark*, 2 Biss. 251; *The E. A. Barnard*, 2 Fed. Rep. 712.

(z) *The Native*, 14 Blatchf. 34.

(a) *The Royal Arch*, Swab. 239; *The Helgoland*, Swab. 491.

(b) *Thorsen v. The J. B. Martin*, 26 Wis. 488; *Provost v. Wilcox*, 17 Ohio, 359; *The Harrison*, 2 Abb. C. C. 74; S. C. 1 Sawy. 353. *The Theodore Perry*, 8 Cent. Law J. 111; *The Favorite*, 3 Sawy. 405. Vide *Underwriters Wrecking Co. v. The Katie*, 3 Woods, 182.

(c) *The Dowthorpe*, 2 W. Rob. 73.

(d) *The City of Tawas*, 3 Fed. Rep. 170; *The John T. Moore*, 3 Woods, 61; *Miller v. The Alice Getty*, 9 C. L. N. 315; *The Island City*, 1 Low. 375.

(e) *The Emily Souder*, 17 Wall. 666; *The Acme*, 7 Blatchf. 366; *Thomas v. The Kosciusko*, 11 N. Y. Leg. Obs. 38. Vide *The Pacific*, Brow. & L. 243; *The Scio*, L. R. 1 A. & E. 53.

(f) *The Aline*, 1 W. Rob. 111.

(g) *The E. M. McChesney*, 8 Ben. 150; *Justi Pon v. The Arbuster*, 6 A. L. Reg. 511.

(h) *The Duke of Bedford*, 2 Hagg. 294; *Furniss v. The Magoun*, Olc. 12; *The Mary*, 1 Paine, 671. Vide *The Royal Arch*, Swab. 269.

(i) *The Acacia*, 42 L. T. (N. S.) 264; *Williams v. Allsup*, 10 C. B. (N. S.) 417; *Scott v. Delahunt*, 65 N. Y. 128.

(j) *Kellogg v. Brennan*, 14 Ohio, 72; *Provost v. Wilcox*, 17 Ohio, 359; *Donnell v. the Starlight*, 103 Mass. 227; *Jones v. Keen*, 115 Mass. 170; *The Hull of a New Ship*, 2 Ware, 203.

(k) *Thurber v. The Fannie*, 8 Ben. 429; *Best v. Staple*, 61 N. Y. 71; *Perkins v. Emerson*, 59 N. e. 319; *Foster v. Perkins*, 42 Me. 168; *Hic v. Williams*, 17 Barb. 523; *Veazie v. Somerby*, 87 Mass. 280.

and the priority of conflicting liens on such vessels depends entirely on the state laws.^(l) But if a vessel on which a mortgage is given while it is in the process of construction is subsequently registered or enrolled, and another mortgage given to a person who has no notice of the first, and who has his mortgage duly recorded at the custom-house, then the last mortgage is entitled to priority over the first.^(m) If a mortgage of a vessel of the United States is recorded at the custom-house where the vessel is registered or enrolled, then it is valid as against a subsequent mortgage, although the mortgagee does not comply with the state laws relating to the registration of chattel mortgages; for the act of congress is paramount to and exclusive of state laws upon the same subject.⁽ⁿ⁾ The mortgagee in such case is also entitled to priority over an antecedent mortgage which was not recorded at the custom-house where the vessel was registered or enrolled, although it was recorded at some other custom-house,^(o) or pursuant to state laws,^(p) unless he had actual notice thereof; but if he had actual notice thereof then his mortgage is postponed to the prior mortgage.^(q)

The statute does not apply to liens created by state laws for supplies or repairs to domestic vessels, for it relates only to the registration of written instruments.^(r) A mortgage of a vessel of the United States is, therefore, subject to prior liens under state laws of the state in which the custom-house is located at which the mortgage is recorded.^(s) But if a vessel is removed into another state, after the attaching of the lien under the state laws, and there registered or enrolled, a mortgage duly recorded at the custom-house, in the state to which the vessel is so removed, is entitled to priority over the antecedent lien under the state law.^(t) If the mortgagee allows the mortgagor to remain in possession of the vessel, then his mortgage, although it is duly recorded at the custom-house where the vessel is registered or enrolled, is postponed to liens subsequently incurred in the course of the employment of the vessel, whether they are maritime liens,^(u) or the liens of a shipwright at common-law,^(v) or liens under state laws;^(w) for he is deemed to give his consent and authority to the incurring of such obligations as are usual in the course of the business in which the vessel is engaged.

(l) *Foster v. Perkins*, 42 Me. 168.

(m) *Perkins v. Emerson*, 59 Me. 319. *Contra*, *Stinson v. Minor*, 34 Ind. 89.

(n) *White's Bank v. Smith*, 7 Wall. 646; *Aldrich v. Aetna Company*, 8 Wall. 491; S. C. 26 N. Y. 92; *Blanchard v. The Martha Washington*, 1 Cliff. 463; *Mitchell v. Steetman*, 8 Cal. 363; *Fountain v. Beers*, 19 Ala. 722; *Robinson v. Rice*, 3 Mich. 235.

(o) *The John T. Moore*, 3 Woods, 61; S. C. 100 U. S. 145.

(p) *Foster v. Chamberlain*, 41 Ala. 153; *Thomas v. The Kosciusko*, 11 N. Y. Leg. Obs. 33.

(q) *Moore v. Simonds*, 100 U. S. 145.

(r) *Thorsen v. The J. B. Martin*, 26 Wis. 483.

(s) *The Harrison*, 2 Abb. C. C. 74; S. C. 1 Sawy. 553; *The Theodore Perry*, 8 Cent. Law J. 191; *The Favorite*, 3 Sawy. 405.

(t) *The Underwriters' Wrecking Co. v. The Katie*, 3 Woods, 182.

(u) *Reeder v. The George Creek*, 3 Hughes, 594; *The Emily Souder*, 17 Wall. 366; *The Granite State*, 1 Spr. 277; *Scott's Case*, 1 Abb. C. C. 336;

Baldwin v. The Bradish Johnson, 3 Woods, 582; *Hatton v. The Melita*, 3 Hughes, 494; *The Josephine Spangler*, 9 Fed. Rep. 777; *Miller v. The Alice Getty*, 9 C. L. N. 315; *The Favorite*, 3 Sawy. 405; *The Hendrick Hudson*, 17 Law Rep. 93; *Zollinger v. The Emma*, 3 Cent. Law J. 285.

(v) *Marsh v. The Minnie*, 6 A. L. Reg. 328; *Scott v. Delahunt*, 65 N. Y. 128.

(w) *The Hiawatha*, 5 Sawy. 160; *The Wm. T. Graves*, 14 Blatchf. 189; S. C. 8 Ben. 563; *The Island City*, 1 Low. 375; *The Raleigh*, 2 Hughes, 44; *Srodes v. The Collier*, 9 Pittsb. Law J. 73, 193; *The St. Joseph*, 1 Brown, Adm. 202; *Miller v. The Alice Getty*, 9 C. L. N. 315; *Whittaker v. The J. A. Travis*, 7 C. L. N. 275; *The Canada*, 7 Fed. Rep. 730; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236. *Contra*, *Baldwin v. The Bradish Johnson*, 3 Woods, 582; *The John T. Moore*, 3 Woods, 61; *The Kate Hinchman*, 6 Bliss, 367; *The Kate Hinchman*, 7 Bliss, 233; *The Grace Greenwood*, 2 Bliss, 131; *Scott's Case*, 1 Abb. C. C. 336; *The Josephine Spangler*, 9 Fed. Rep. 777.

MASTER'S LIEN. Under the act of 17 & 18 Vict. c. 104, § 191, the master of a British ship has the same lien for his wages as a seaman. He is, by virtue of this statute, entitled to priority over an antecedent mortgage, (x) and a bottomry bond given during the voyage, if he is not bound personally. (y) But his lien for wages on one voyage is postponed to a bottomry bond given during a subsequent voyage. (z) If the master is liable personally for a debt, either as master or part owner, then his lien is postponed to the lien for that debt, whether it consists of a lien for seamen's wages, (a) or for necessary supplies or materials, (b) or for the services of a watchman, (c) or of a bottomry bond. (d)

WHEN CLAIMANT IS PART OWNER. If a person claiming a lien is personally liable for a debt as part owner, his lien is postponed to the lien for that debt. (e) If a ship-broker allows the ship to go into the possession of a shipwright, his claim is postponed to that of the shipwright. (f)

DILIGENCE. The last maritime lien is entitled to priority over an antecedent lien, although the earlier claimant could not, even by the use of reasonable diligence, have instituted a suit to enforce his lien before the later one attached. (g)

PRIORITY BY SUIT. The holder of a lien does not obtain any right to priority over other liens of an equal or a higher rank, although he is the first to file a libel or to obtain a decree; for the decree is considered to be so far under the control of the court that the proceeds arising from a sale of the ship may be distributed among those who have pending libels, or who file intervening petitions according to their respective rights. (h) But it is manifest, from the very nature of a proceeding *in rem*, that there must be some stage of the proceedings at which the proceeds will be deemed to be conclusively appropriated to the claims then filed, for such a proceeding is a proceeding against all persons having an interest in the *res*, and by failing to appear they tacitly assent to a decree which cuts off their interests and appropriates the proceeds to the payment of other demands. It has been held that no creditor can intervene after the filing of a report classifying the claims. (i)

LEX FORI. Whether one lien is entitled to priority over another depends upon the *lex fori*, and not upon the *lex loci contractus*. (j)

ORLANDO F. BUMP.

(x) *The Chieftain*, Brow. & L. 212; *The Feronia*, L. R. 2 A. & E. 65; *The Mary Ann*, L. R. 1 A. & E. 8; *The Hope*, 1 Asp. M. L. Cas. 563; S. C. 23 L. T. (N. S.) 287; *The Wexford*, 7 Fed. Rep. 674.

(y) *The Salacia*, Lush. 545.

(z) *The Hope*, 1 Asp. M. L. Cas. 563; S. C. 23 L. T. (N. S.) 287.

(a) *The Salacia*, Lush. 545.

(b) *The Jenny Lind*, L. R. 3 A. & E. 529; *The Selah*, 4 Sawy. 40; *Hatton v. The Melita*, 3 Hughes, 494; *Covert v. The Wexford*, 3 Fed. Rep. 577.

(c) *The Erinagh*, 7 Fed. Rep. 231.

(d) *The William*, Swab. 346; *The Jonathan Goodhue*, Swab. 524; *The Edward Oliver*, L. R. 1 A. & E. 37; *The Eugenie*, L. R. 4 A. & E. 123; *The Daring*, L. R. 2 A. & E. 260.

(e) *Logan v. The Æolian*, 1 Bond, 267; *Petrie v. The Coal Bluff*, 3 Fed. Rep. 531.

(f) *The Panthea*, 1 Asp. M. L. Cas. 133; S. C. 25 L. T. (N. S.) 389.

(g) *The Frank G. Fowler*, 8 Fed. Rep. 336. *Vide Goble v. The Delos De Wolf*, 3 Fed. Rep. 236.

(h) *The America*, 16 Law Rep. 264; *The Fanny*, 2 Low. 508; *The E. A. Barnard*, 2 Fed. Rep. 712; *The Superior*, Newb. 176; *The City of Tawas*, 3 Fed. Rep. 170; *The Desdemona*, Swab. 158. *Contra*, *The Saracen*, 4 Notes of Cases, 498; S. C. 2 W. Rob. 451; S. C. 6 Moore, P. C. 56; *The Clara*, Swab. 1; *The William F. Safford*, Lush. 69; *The Globe*, 2 Blatchf. 427; *The Triumph*, 2 Blatchf. 433, note; *Goble v. The Delos De Wolf*, 3 Fed. Rep. 236; *The Pathfinder*, 4 W. N. 528.

(i) *The City of Tawas*, 3 Fed. Rep. 170.

(j) *The Union*, Lush. 128; *The Selah*, 4 Sawy. 40.

MISSOURI, KANSAS & TEXAS RY. CO. v. TEXAS & ST. LOUIS RY. CO.

(Circuit Court, N. D. Texas.)

1. JURISDICTION—CORPORATIONS EXISTING UNDER THE LAWS OF TWO STATES.

Where a corporation is organized under the laws of one state it becomes a citizen of that state, although the same persons, by the same corporate name, have been incorporated with the same powers and the same objects by another state. Such an act of incorporation must be construed as only a license enlarging the field of its operations, and it does not constitute it a corporation of that state, but shorn of none of its qualities as a corporation of the state under which it is organized. It is privileged to elect to sue in the United States courts.

2. CONSTITUTIONAL CONSTRUCTION—INTERSECTING RAILWAYS.

Article 10, § 1, of the constitution of Texas, which provides that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," is not self-acting, but requires appropriate supplementing legislation prescribing the regulation of its exercise.

3. SAME—INJUNCTION—IRREPARABLE DAMAGE.

Railroad crossings, by intersecting lines, are such a source of danger from liability to collision in the transit of trains as could not be adequately compensated in damages, or by any moneyed consideration, and, except under the pressure of some paramount necessity, their construction should be enjoined.

4. RIGHT OF WAY.

When the right of way over private property, or the right of crossing a public highway, has been acquired, certain common rights attach to the new acquisition, which are to be considered, protected, and enforced by the proper tribunals.

In Equity. Application in chambers for temporary injunction.

W. H. Herman, Welborn, Leake & Henry, and R. C. Foster, for complainant.

Hubbard, Whitaker & Bonner and Clark & Dyer, for defendant.

MCCORMICK, D. J. The complainant, in its bill and amended bill, avers in substance that it is a corporation duly organized under the laws of Kansas, and as such is also authorized, by act of the legislature of Texas, to extend its railroad and telegraph through Texas; that it is now engaged in extending its lines of railroad through Texas, having portions thereof in operation, and other portions located and in process of construction; that in January last it located its line through McLennan county and into the city of Waco, approaching the line of the Central Railroad at that point on a tract of land known as the Norris land, and in March last obtained from the proper party full title to the right of way over said land on complainant's said located line, and is now engaged in constructing its main line and side track on said Norris land, on said right of way; that

defendant is a corporation created by the laws of Texas, and is also constructing its railroad through McLennan county and into the city of Waco, having originally located its line so as to approach said Central Railroad at a point some distance west of the point on the Central where complainant's line intersected the Central; that complainant's line crosses defendant's line at the distance of a little less than one mile from its intersection with the Central line, and from said point of crossing complainant's line, and defendant's line as originally located, gradually diverge from each other as they respectively approach the Central Railroad's line; that complainant and defendant were proceeding with the construction of their respective railroads on their respective lines as so originally located; that defendant failed to obtain the consent of the said Central road to have its railroad crossed at the point where defendant's line, as originally located and being constructed, would have crossed said Central road, and thereupon the defendant changed the location of its road so as to bring the same nearer to complainant's line, and to cross the Central at a point only a few feet west of the point at which complainant's line crosses said Central; that by said change of location, which change was made after complainant located its line, and had procured its said right of way on said Norris land, and was engaged in the construction of its said tracks thereon, complainant was disappointed in its purpose of effecting its connection with said Central road by putting in a "Y" on the west of complainant's line, leaving the space on the west thereof to be occupied by the defendant's main and connecting tracks; that, after some work had been done by defendant on its changed line, the defendant undertook, without first obtaining or asking complainant's consent, and without making, or offering to make, any compensation therefor to complainant, to cross said complainant's main and side tracks, and right of way on said Norris land, and extend its (defendant's) line to a point of intersection with said Central line east of complainant's line, and to return on the line of said Central's track and recross complainant's line, said last-named two crossings being not more than 290 feet, the one from the other, and making three crossings of complainant's main track and one of its side tracks within the space of one mile; that upon either side of its line the defendant can obtain as easy and practicable a route for its road, and space for its connections with said Central, without making either of said last-named crossings of complainant's line of main track and side track; that said last-named crossings are unnecessary, and could only be maintained at

great expense, and would be such a source of danger of collision in the transit of trains as could not be adequately compensated by any moneyed consideration; that the complainant having first located its line there, and procured its right of way, and being in the actual occupancy thereof, and engaged in the construction of its main track and side track thereon, requires the sole and unobstructed use thereof for its business, and to suffer such crossing there would work irreparable injury to complainant; that defendant is threatening and attempting violently to effect said crossing, against the objection and warning of complainant. And complainant's prayer is for an order restraining and enjoining defendant from making said crossings against complainant's objection, "and from attempting to compel by law a right to do so."

The answer in substance is—*First*, that complainant is not such a party as to the matters in issue as can sue the defendant in reference thereto in the circuit court of the United States; *second*, that defendant does not propose to cross complainant's line with defendant's main track, but only to lay a side track across the complainant's line to connect with the Central, and return with the Central line to defendant's main track; that defendant has found it impracticable to connect with the Central in any other manner, or at any other place; that defendant expects and now offers to make and maintain said crossing at defendant's expense, and that if not allowed to make its connection in that way with the Central, defendant will be greatly damaged.

On the question of jurisdiction, raised by the answer, the proof shows that the complainant was organized as a corporation under a general act of the state of Kansas, and that on the second of August, 1870, the legislature of Texas passed "An act in relation to the Missouri, Kansas & Texas Railway Company," giving said company the right to extend its railroad through the state of Texas, and, among other things, not material here, providing—

"That the said company, in constructing, extending, and operating its railroad and branches, shall have and exercise and are hereby vested with all the rights, powers, privileges, and immunities granted by its acts of incorporation and amendments thereto, so far as the same may be applicable to this state, and not inconsistent with the constitution thereof, together with all the rights, powers, privileges, and immunities conferred by all general laws now existing or that hereafter may be passed by the legislature of the state of Texas, in relation to railroad corporations, in same manner and to same extent as if incorporated by this state, provided the said company shall keep an office within the state."

This question has been treated by the supreme court as one full of difficulty and delicacy. In one of the earliest cases in which the right of a corporation to sue in the circuit court was entertained, the language of the opinion was nervously vigorous in rejecting the proposition that such a purely legal entity and artificial intangible creature of the law of a state could be deemed a citizen of a state within the meaning of the constitution; but feeling under equal obligation to entertain jurisdiction in a proper case, and to decline to usurp jurisdiction in any case, it was held in that case, not without much misgiving, as we now know, that although such a creature of the law could not be a citizen, it might be (and in that case was) composed of real persons who were citizens, and that such citizens, their citizenship being such that suing in their own names the suit could be entertained, might sue in the corporate name which represented them. 5 Cranch, 87.

In a later case it was considered that while the corporation was an intangible creature of the law, real persons having dealings with it encountered very real natural persons representing it in the state creating it, and that these real natural persons constituting its management were the parties in fact to its transactions and to its litigation, and that so contemplated, and for the purpose of determining the question of jurisdiction in suits, a corporation created by and doing business in a particular state is to be deemed, to all intents and purposes, as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person. And it has grown to be the settled doctrine that the real persons composing a corporation are conclusively presumed to be citizens of the state incorporating it, and no inquiry in relation thereto is permitted. 2 How. 558; 16 How. 325; 20 How. 232. In a later case a new phase of the question was met, and it was held that where two states (Ohio and Indiana) had each chartered a corporation by the same name, and with the same capacities and powers, and intended to accomplish the same objects, and which was spoken of in the laws of said states respectively as one corporate body, exercising the same powers and fulfilling the same duties in both states, said corporate body cannot maintain a suit against a citizen of Ohio or Indiana in the circuit court. 1 Black, 297, 298. Again, where a citizen of Illinois brought suit in Wisconsin against the Chicago & Northwestern Railway Company, a corporation created by and existing under the laws of the states of Wisconsin, Illinois, and Michigan,

operating its line in part in each of these states, the whole of the said line being managed by the defendant as a single corporation, whose principal office and place of business was in the city of Chicago, in the state of Illinois, on objection to the jurisdiction of the circuit court on the ground that the defendant was a citizen of Illinois, (of which state plaintiff was a citizen,) the objection was overruled, and it was held that in Wisconsin the defendant was a citizen of Wisconsin. 13 Wall. 284.

In delivering the opinion of the court in the case just cited, Mr. Justice Field refers to a recent decision in the case of the *Railroad v. Harris*, 12 Wall. 65, as confirming the correctness of the positions taken in the opinion he was then delivering. The case of the *Railroad v. Harris* presents a parallel, in all essential points, to the case here. The state of Maryland incorporated the Baltimore & Ohio Railroad. The state of Virginia passed an act reciting the Maryland act in full, and granting to the company the right to extend its road through the state of Virginia. Congress also passed acts referring to the Maryland act, (but not reciting it,) by which the company was authorized to extend a line of its road to the city of Washington, in the District of Columbia. Harris, a citizen of the District of Columbia, sued the company in the district on a cause of action growing out of the negligent handling (as alleged) of its trains at a named point in the state of Virginia. The company objected to the jurisdiction on the ground that, being chartered by Maryland, it was a citizen of that state; that it could not emigrate, and was not liable to suit in the district. On the case being considered in the supreme court there was a unanimous concurrence of opinion in favor of holding the company liable to the suit in the district, but some diversity of opinion as to the ground upon which that holding should repose; and the case was set down for reargument on the question as to the construction of the legislation of Virginia and of congress subsequent to that of Maryland originally incorporating the company; whether such subsequent legislation was a new birth, making the company a Virginia corporation in Virginia, and a corporation created by congress in the district of Columbia, or was such subsequent legislation only a license by which the field of the company's operation was extended; and, after this deliberate consideration, and full argument of counsel on this question,—the turning question in this case, and thought to be of the highest importance in that case,—the court held that the acts of Virginia and of congress did not incorporate said company, but only extended the field of its operations.

So far, then, as the rule has been developed by adjudged cases, it appears to be that where the act of a state provides for the organization and incorporation of a company it thereby becomes a corporation of that state, and in that state is a citizen thereof for the purposes of suit, although the same persons, by the same corporate name, have been incorporated, with the same powers and for the same object, by another state; but when the act does not create the corporation, and recognizes it as already existing by the laws of another state, and extends to it like powers (or such of them and with such limitations and on such condition as may be named) as are given it by the laws of the state incorporating it, such act must be construed to be only a license enlarging the field of operations of the company, and said company, upon extending its operations under such an act into the state passing such an act, does not become a corporation of that state, but goes there as the corporation of another state, liable to be sued in the state embracing the new field of its operations, but shorn of none of its qualities as a corporation of another state.

And if the act of Virginia, above referred to, did not incorporate the Baltimore & Ohio Railway in Virginia, and make it a Virginia corporation as to its operation in that state, surely the act of 1870 by this state did not make the complainant a Texas corporation as to its operations in this state. It remains a citizen of Kansas, as such privileged to elect to sue in the United States courts.

On the merits of this controversy the parties in the bill and answer, and their respective assistant affidavits, indulge and exhibit much contrariety of view as to the facts; but I clearly gather from the affidavits, and from the bill and answer, that defendant has changed the location of its line substantially as alleged in the bill, and was threatening and attempting to push a side track across complainant's right of way, crossing the main track and side track of complainant so as to connect with the Central at a point east of complainant's line, and return with said Central's track to defendant's main line, which, at this point, is west of complainant's line, thus crossing complainant's line twice at points not more than 290 feet apart, and less than one mile from the first crossing of complainant's and defendant's railroads; that defendant is advised by its engineer, and its other officers believe, that said connection with the Central is the only one practically possible to be made, and that complainant's engineer advises, and its officers believe, that just as easy and practicable connection with the Central can be made there by the defendant without so placing a side track across complainant's tracks; that complainant's consent so to

cross was not asked, or any offer of compensation of any kind made complainant, but a violent and irregular and unusual effort was being made to push defendant's said track across complainant's right of way without asking any consent, and in defiance of complainant's warning to desist, and that at the time of submitting the bill both parties, with strong construction forces, were standing facing each other at the point in question, indulging the defendant in surprises and night attacks, and such tumult as put the local community in an uproar.

The defendant asserts its right to cross complainant's tracks and right of way without asking the favor or consent of complainant, and, of course, without resort to legal proceedings to compel such consent. This claim it rests upon this language of the constitution of Texas: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad."

Is this part of a sentence, taken from section 1, art. 10, of the constitution, so far self-acting as to give the defendant a license to judge of its own case, and execute its own judgment thereon? The language is general, as the language of constitutions usually is, and where such language is used to restrain action—as restraining execution from taking the homestead, (defining the homestead,) or to specify the powers of some branch of the government or of some officer—it may well be held to be self-operating; but where it can operate only by affirmative action of private parties, and come in sharp conflict with other private interests, such a general provision needs supplementing by appropriate legislation prescribing the regulation of its exercise. I so construe this provision, and am of opinion that the defendant should be restrained from effecting said crossings of complainant's tracks until by negotiation, or by the proper legal proceedings, the defendant shall have fixed its right (with the prescribed or adjudicated limitations) to make said crossings.

Stress is laid by defendant's counsel in his argument on the words "irreparable damage." It is hardly necessary, in this case, to indulge in any philological disquisition on this text. The most common experience has little need of the testimony of experts to aid it in reaching the conclusion that such crossings as this application seeks to have restrained would be such a source of danger of collision in the transit of trains as could not be adequately compensated by any moneyed consideration, and such as should not be permitted except under the pressure of some paramount necessity for the service of the public convenience or of the state. The complainant insists

that no such necessity exists, and asks this court to so adjudge, and to restrain the defendant from resorting to other legal proceedings to compel a right to make said crossing. And in argument of its counsel I am referred to cases in 43 and 66 New York Reports, where the court determined that the property in those cases sought to be condemned was not necessary to be devoted to the use of the companies seeking the condemnation. These cases repose on the language of the New York statute, and, besides this, are cases in the state courts, where, if at all, the right to enforce or refuse such claims to expropriation must, in my opinion, reside. When the right of way over private property, or the right of crossing an established public highway, has been acquired and fixed by the acts of the competent parties, either voluntarily contracting or judicially constrained to consent, then certain common rights attach to this new acquisition of right, and these common rights may be considered by and protected and enforced by this court in any case where the character of the parties brings the case within the jurisdiction of this court. But until this right of way is thus fixed the claim to it is so far in derogation of common right as to require full compliance with all the regulations of the law under which it claimed, including a resort to the particular tribunals by that law set for passing upon such claims and fixing such rights. If the circuit court of the United States can restrain parties from attempting to secure a right of way by process of condemnation under the state laws, could these courts not as well entertain and conduct the proceedings for such condemnation wherever such a party as this complainant was seeking to condemn, and the the adverse party was a citizen of Texas?

In accordance with the foregoing views a temporary injunction will be ordered, but it will not restrain the defendant from attempting to compel by law a right to cross complainant's tracks and right of way.

NOTE. For the purposes of jurisdiction a corporation is conclusively considered a citizen of the state which created it, and under whose laws it was organized, and not of that state under whose laws it has entered to operate its line of railway in connection with another line. *Williams v. Missouri, K. & T. R. Co.* 3 Dill. 267. See *Baltimore & O. R. Co. v. Cary*, 28 Ohio St. 208; *County of Allegheny v. Cleveland & P. R. Co.* 51 Pa. St. 228.

If, however, the effect of the legislation be to adopt the corporation, it becomes, for the purposes of jurisdiction, a corporation created by the state adopting it. *Uphoff v. Chicago, St. L. & N. O. R. Co.* 5 FED. REP. 545. And see *C. & W. I. R. Co. v. L. S. & M. S. R. Co.* 5 FED. REP. 19, and *Johnson v. Philadelphia, W. & B. R. Co.* 9 FED. REP. 6.—[ED.]

UNITED STATES *v.* WICKERSHAM.

(Circuit Court, W. D. Tennessee. February 24, 1882.)

1. RECEIVER—PROPERTY IN POSSESSION OF THE UNITED STATES—DEFENDANT'S CLAIM WHEN UNITED STATES IS PLAINTIFF—JURISDICTION.

Where the United States filed a bill in the circuit court to forfeit a lease of lands belonging to them, and for a receiver, and by consent of parties the United States was placed in possession of the property under a decree containing certain stipulations as to the rights of the parties in the improvements and the rents to be collected by the United States, *held*, that the jurisdiction of the court over the property was ousted by the surrender of possession to the United States, and the court could, after that surrender, neither appoint a receiver on application of defendant, nor enforce against the United States any claim arising from the stipulations of the decree. And it is the duty of the court to decline jurisdiction on its own motion.

2. SAME—JURISDICTION—LIABILITY OF UNITED STATES—WRONGFUL ACTS OF AGENTS.

The United States is not liable to a defendant in the circuit court for the wrongful conduct of its agents in the management of the property in controversy, there being no jurisdiction to grant relief.

3. SAME—ESTOPPEL—CONDUCT OF THE AGENTS AND ATTORNEYS OF THE UNITED STATES.

The fact that the agent of the treasury department and the United States district attorney treated the suit as if the court still had jurisdiction over the property, and it were in the hands of a receiver, and that orders by the court pertaining to his accounts were entered, does not estop the United States or give the court jurisdiction.

4. SAME—REMEDY OF DEFENDANT.

The defendant may have a remedy by application to the court of claims, or to congress, or to the executive department in charge of the property, to grant whatever relief he is entitled to in the premises, but not by any motion or other aggressive proceedings for affirmative relief in the suit originally brought by the United States to enforce their claims against him.

In Equity.

The United States being the owner of a lot in the city of Memphis, leased it to the defendant for a term of five years at an annual rent of \$2,100. The defendant erected thereon certain brick buildings, which remain on the land, and one of the covenants of the lease permitted them to be removed at the termination of the lease. The defendant being in default in the payment of rent, the United States on June 4, 1869, before the termination of the lease, brought an action of ejectment in this court for the premises, and on the same day filed the bill in this cause to sequester the rents, to enjoin the defendant from collecting them, for the appointment of a receiver, and for general relief. On May 5, 1873, the United States recovered judgment in the ejectment suit, "subject to defendant's right to remove the

buildings from the same * * * before the next November term of this court." On this judgment a writ of possession issued March 1, 1876, which the marshal returned "executed by putting W. J. Smith, surveyor of customs, in possession as agent of the United States." The United States also, on said fourth day of June, brought an action for the past-due rents, and on April 15, 1871, recovered judgment for the sum of \$608.20.

In the equity case a receiver was appointed, and on interlocutory decree it was determined that the United States were not entitled to recover the contract rent, but only for use and occupation \$800 per annum. The defendant himself was at first appointed receiver, but, failing to report, was soon removed and one Griffin appointed, who collected and distributed the rents according to the orders of the court. On April 15, 1871, a decree was entered declaring the lease forfeited, the ground to belong to the United States, and the buildings to the defendant. By this decree J. E. Bigelow was appointed receiver, and ordered to collect the rents and pay to the United States \$800 per annum, ground rent, which he proceeded to do until March 1, 1876, when there was due from the receiver to the United States the sum of \$1,500 for arrears of ground rent, and on that day the following decree was entered in this cause:

"It having been established by a former decree of this court that the buildings and improvements upon the property in question in this cause are the property of the defendant, and it appearing to the court, by agreement of the parties, that there is ground rent due from the defendant to the United States, accruing since the present receiver was appointed in this cause, owing to the great decline in rents, and for the purpose of settling and paying off said past-due rent, it is, by agreement of the parties, ordered, adjudged, and decreed by the court that the said property be turned over to the United States, that the United States rent out said property, collect the rents, and apply them to the payment of said past-due rents until the same is fully satisfied, and then if the question of amount of ground rent can be agreed upon between the parties, then the said property shall be placed back into the hands of the defendant or his solicitor, J. E. Bigelow, to be held upon the terms to be agreed upon; but should the parties fail to agree about the ground rent, then the said defendant or his solicitor, J. E. Bigelow, shall be allowed to remove the said buildings from said premises at any time within 90 days after such failure to agree upon ground rent. But should the United States desire to sell the said ground before the full amount of said back rent shall have been paid, it shall be at the option of the defendant or his solicitor, J. E. Bigelow, either to have the said buildings sold, and any balance that may be due upon the back ground rent paid out of the proceeds of sale, and have the balance paid over to the said defendant or his said solicitor, or to pay such balance in cash, or allow the United States to continue to collect the rents of

said buildings until said past-due rents of said ground shall all have been paid. And should the United States sell said property, and the defendant or his said solicitor be unable to make terms of ground rent with the purchaser, or to sell to the purchaser, then the sale shall be made with the privilege to the defendant or his said solicitor to remove said buildings at any time within 90 days from the date of the sale, all past-due rents having been paid, and that whenever said property is turned over to the United States under this decree, then and from thenceforth the receiver, J. E. Bigelow, shall be discharged from future liability as receiver herein; and it is further agreed that no suit will be brought on the bond of said J. E. Bigelow as such receiver, filed herein, unless the United States should fail to realize all due ground rents under the above decree."

Subsequently to this decree Smith, the collector of customs, from time to time filed reports in this cause, sometimes styling himself "receiver," and sometimes "agent of the United States." On May 28, 1877, on application of defendant, "W. J. Smith, into whose hands the property involved in this cause was placed, as agent of the United States by a former decree," was required to report, etc. June 9, 1877, he filed a report styling himself "agent of the United States" for rents, etc. June 23, 1877, he filed a petition by the United States district attorney reciting that he had been appointed receiver by a former decree, and asking the court to authorize certain repairs, disbursements, etc., and an order was entered in compliance therewith, on the same day, authorizing "W. J. Smith, receiver," to make repairs, etc. January 28, 1878, on application of defendant, Smith was required to report without being styled either agent or receiver. February 22, 1878, he filed a report as "agent of the United States," and a like report was filed June 3, 1879, which, on the tenth of the same month, was confirmed as the report of "W. J. Smith, receiver," and, on his application, his commissions were fixed at 10 per cent. of his collections. In October, 1880, he filed a report as "agent of the United States," and another in like manner in February, 1881; and since this motion has been pending he files another report as "agent for the United States," by which it appears that he has paid into the treasury of the United States, from time to time, in all the sum of \$1,500, the amount of rent in arrear at the date of the consent decree of March 1, 1876, and now has a balance in his hands of \$174.82.

The defendant makes this motion asking for the appointment of a receiver, and a reference to a master to take proof and state Smith's accounts, showing not only his actual collections, but charging him with the rents he should have collected on a proper management of

the property, alleging that he has been neglectful and wasteful in the discharge of his duties, etc.

W. W. Murray, Dist. Atty., and *John B. Clough*, Asst. Atty., for the United States.

J. E. Bigelow, for defendant.

HAMMOND, D. J. When this motion was first made it occurred to me that the court had no jurisdiction to grant it, or that it involved the exercise of authority beyond the power of the court to enforce, if the jurisdiction be conceded. It may be assumed that the United States, whenever it comes into this court and brings its suit against a citizen, consents to submit to and carry out whatever decrees may be lawfully made against it in the ordinary course of the legal procedure. But we have no jurisdiction here to decree against the United States for the delivery up of its property, or of that of the citizen in its possession, or to order accounts against its executive agents, or to decree the payment by them of the money of the United States.

We certainly do not enforce contracts *against* the United States, although we have jurisdiction to enforce them in its favor. Section 1059 of the Revised Statutes enacts that—

“The court of claims shall have jurisdiction to hear and determine the following matters: *First*, all claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States.”

The case of *U. S. v. Bostwick*, 94 U. S. 53, was a suit in the court of claims founded upon a contract with the United States about the use and occupation of land and improvements thereon; and that of *De Groot v. U. S.* 5 Wall, 420, was a suit in that court upon an arbitration award on a similar contract, though it was brought under a special act of congress, and held to be not properly brought on the award which had been abrogated by congress. The court there says of the rule that the United States cannot be sued for a claim or demand against it without its consent:

“This rule is carried so far by this court that it has been held that when the United States is plaintiff in one of the federal courts, and the defendant has pleaded a set-off which the acts of congress have authorized him to rely on, no judgment can be rendered against the government, although it may be judicially ascertained that on striking a balance of just demands the government is indebted to the defendant in an ascertained amount. And if the United States shall sue an individual in any of its courts and fail to establish a claim, no judgment can be rendered for the costs expended by the defendant in his defence.”

In *U. S. v. Eckford*, 6 Wall. 484, there was a suit in the court of claims for a balance alleged to be due a collector who had been sued by the United States in a district court, and had pleaded, as the statute allowed him, a set-off. The verdict was against the United States, and the jury certified that there was due him from the United States the amount sued for in the court of claims. It was held that neither in the original suit nor in the court of claims could there be a judgment against the United States for the balance. The court says:

"Where a party contracting with the United States is dissatisfied with the course pursued towards him by the officers of the government, charged with the fulfilment of the contract, his only remedy, except in the limited class of cases cognizable in the court of claims, is by petition to congress."

In *Schaumburg v. U. S.* 103 U. S. 667, it was held not to be error, where the statute allows set-off to be pleaded, to refuse to find or certify a balance due from the government, although under some circumstances it may be proper to do so. It was said:

"Claims for a credit can be used in suits against persons indebted to the United States to reduce or extinguish the debt, but not as a foundation of a judgment against the government."

In *Hall v. U. S.* 91 U. S. 559, it is said:

"Questions of the kind, where the United States is plaintiff, must be determined wholly by the acts of congress, as the local laws have no application in such cases." See, also, *Watkins v. U. S.* 9 Wall. 759-765.

In the case of *The Siren*, 7 Wall. 152, it was said:

"The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried the case, there is no distinction between suits against the government directly, and suits against its property."

And the court, proceeding, uses this language:

"But, although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit they waive their exemption so far as to allow a presentation by the defendants of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem* they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except they are exempt from costs, and from affirmative relief against them, beyond the demand or property in controversy."

It was a case in which a prize vessel had damaged another by collision, the prize being in fault. When libelled at the suit of the United States in the prize court the owner of the damaged sloop

intervened and claimed his damages, and it was held that he was entitled to them. The effect of the principle we are considering was elaborately examined on authority with the above result. It was subsequently, in the case of *The Davis*, 10 Wall. 15, explained and confirmed. In that case a vessel and her cargo were libelled for salvage. The cargo belonged to the United States, but was not, when the suit was brought, in the actual possession of the United States, or its officers or agents, but in that of the master of the vessel, and the proceeds being in court, it was held that the claim for salvage could be enforced. The court said:

"That rule * * * admits that the lien can only be enforced by the courts in a proceeding which does not require that the property shall be taken out of the possession of the United States. But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the courts? The possession which would do this must be an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process."

These cases are again further explained in *Case v. Terrell*, 11 Wall. 199, where it was adjudged that no judgment for money could be rendered against the United States in any court other than the court of claims without a special act of congress conferring jurisdiction, and that the appearance of the comptroller of the currency and a receiver of a bank appointed by him, submitting, through the district attorney, to the decision of the court in behalf of the United States, could not confer jurisdiction. And in *Carr v. U. S.* 98 U. S. 433, they again came before the court, and their effect as adjudications was explained. It was there determined that the appearance of the district attorney and special counsel employed to represent the government in actions of ejectment brought against its agents in possession did not estop the government to deny the jurisdiction. So in *Hart v. U. S.* 95 U. S. 316, it was ruled that the government is not responsible for the laches or wrongful acts of its officers or agents, and they

cannot be set up as a defence in suits of the United States against a defendant.

These authorities, and many others I have consulted, appended in a note, have confirmed me in the impression I first had, that we have no jurisdiction to appoint a receiver of property in possession of the United States, no power to enforce a surrender of it to a receiver, and no authority to call its agents into this court to account for its management of the property, no matter how the United States obtained the possession, whether through a decree of this court, in which it was a plaintiff, or otherwise. And in answer to the complaint that the court itself raised the objection, it may be said that the federal courts always decline jurisdiction on their own motion whenever it appears that they have no jurisdiction of the subject-matter in controversy. It is particularly the duty of all courts to do so where this prerogative of the government is involved. 8 Bac. Abr. tit. "Prerogative," (Bouv. Ed. 1861,) p. 106; *Barclay v. Russell*, 3 Ves. Jr. (Sumner's Ed.) 424. The defendant seeks to bring this case within the principle of that of *The Siren*, *supra*. It was evidently clearly within that case when first instituted, and so long as the property remained *in custodia legis*, and was in possession of a receiver of this court, we had full jurisdiction; and, if it had been so kept, there would be now no trouble about the jurisdiction. But whenever the defendant allowed it to pass from the control of the court *as a fact*, and into the actual possession of the United States, all power to relieve him here ceased from that moment, no matter what the intention of the court was, or of the parties, nor what the proper construction of the decree may be, nor what the rights of the parties under it may require, as against the United States.

It is impossible, in the nature of the case, for this court to retain control over it while it is in the possession of the United States or its agents, or for this court to wrest it from that possession, however much the defendant may be entitled to have that done. It does not alter the case to treat the United States as a receiver; for a claim founded on any breach of its duty in that behalf is as much beyond our jurisdiction as any other. If the decree had contained a stipulation to do just what the defendant contends its proper construction requires, the result would have been the same. We cannot enforce the stipulation. If it had been one of the stipulations that the United States would hold for this court and pay according to its decrees, the same difficulty would exist. But I do not think the decree subject to such a construction, there being no stipulation to that effect. It was,

in my judgment, a final decree evidencing a contract between the parties. There is no reservation of jurisdiction to enforce the decree, and if there were it could not be carried out here. As between private parties their conduct might be construed as continuing the case open to enforce the decree; but the government cannot be so bound by the acts of its officers, as I have shown.

There can be, in this case, no jurisdiction to enforce any personal liability of the collector of customs. He is not our receiver and never was. He holds his possession under regulations of the treasury department, and as its agent. His accounting here is voluntary, and his misapprehension of his relations in the premises cannot give us jurisdiction. It is plain the remedy of the defendant is by application to the executive department to carry out the stipulations of the decree, or to the court of claims to enforce them, or to congress to relieve him.

Motion denied.

NOTE. Consult *Thompson v. U. S.* 98 U. S. 486, 489; *U. S. v. Gillis*, 95 U. S. 407, 412; *Avery v. U. S.* 12 Wall. 304; *Bonner v. U. S.* 9 Wall. 156; *Nations v. Johnson*, 24 How. 203; *Pennington v. Gibson*, 16 How. 65; *Reeside v. Walker*, 11 How. 272; *Hill v. U. S.* 9 How. 386; *U. S. v. Brown*, 9 How. 487, 500; *U. S. v. Buchanan*, 8 How. 83, 105; *U. S. v. Boyd*, 5 How. 29; *Gratiot v. U. S.* 4 How. 80, 112; *U. S. v. McLemore*, 4 How. 286; *Milner v. Metz*, 16 Pet. 221; *U. S. v. Robeson*, 9 Pet. 319; *U. S. v. Ringgold*, 8 Pet. 150; *U. S. v. Clark*, 8 Pet. 436; *U. S. v. McDaniel*, 7 Pet. 1; *U. S. v. Ripley*, 7 Pet. 18; *U. S. v. Fillebronne*, 7 Pet. 28; *The Antelope*, 12 Wheat. 546; *Hugh v. Higgs*, 8 Wheat. 697; *U. S. v. Barker*, 2 Wheat. 395; *U. S. v. Hooe*, 3 Cranch, 73; *U. S. v. La Vengeance*, 3 Dall. 297; *Meier v. Railway*, 4 Dill. 278; *U. S. v. Flint*, 4 Sawy. 42; *U. S. v. Austin*, 2 Cliff. 325; *The Othello*, 5 Blatchf. 342; S. C. 1 Ben. 43; *U. S. v. Collins*, 4 Blatchf. 142; *U. S. v. Davis*, 1 Deady, 294; *U. S. v. Smith*, 1 Bond, 68; *Wilder v. U. S.* 3 Sumn. 308; *Mezes v. Greer*, 1 McAll. 401; *Elliott v. Van Voorst*, 3 Wall. Jr. 299; *Fendall v. U. S.* 14 Court Claims, 297; *Goodman v. U. S.* 6 Court Claims, 146; 5 Am. Law Reg. 253; 11 Law Rep. (Boston,) 281.

MILLER v. THE MAYOR, ETC., OF THE CITY OF NEW YORK and others.

(Circuit Court, S. D. New York. June 9, 1880.)

1. NUISANCE—BRIDGE OVER NAVIGABLE RIVER.

A bridge constructed over a navigable river under the authority of congress and of the legislature of the state in which it is situated, in the manner authorized by law, is a legal structure, and cannot be held to be a public nuisance, or otherwise unlawful.

2. REGULATION OF COMMERCE—POWER OF CONGRESS.

In the exercise of its power to regulate commerce, congress may authorize the construction of a bridge over a navigable river of the United States, and it may itself approve the design or plan of its construction, or devolve that duty upon the secretary of war.

3. NOTIFICATION OF APPROVAL OF PLAN.

It is competent for the secretary of war to convey notification of his approval of the design and plan of the bridge in any way which would be effectual, and notice given through a subordinate is sufficient.

In Equity.

Wm. H. Arnoux, for plaintiff.

Joseph H. Choate, for defendants.

BLATCHFORD, C. J. The plaintiff brings this bill in equity "on behalf of himself and all others similarly situated with him." The defendants are the cities of New York and Brooklyn, as municipal corporations, and the persons composing the board of trustees of the suspension bridge over the East river between the cities of New York and Brooklyn. The plaintiff does business in the city of New York, as the lessee of certain United States bonded warehouses situated in the city of New York, on the East river, at the corner of Jefferson and South streets, and also as the lessee of certain other warehouses situated in said city on the East river, on South street, between Peck and Rutgers slips. He alleges, in the bill, that the bridge will be built without lawful authority; that it will be a nuisance, and will obstruct, impair, and injuriously modify the navigation of the East river, and may seriously and prejudicially affect the commerce of the port of New York; and that the expense to vessels of striking parts of their masts, in passing under the bridge, with the detention and additional towage, would be so great as to destroy the warehouse business of the plaintiff in such locations, and be a private and irreparable injury to him, for which an action at law would afford no adequate redress to him. The bill prays for a decree that the bridge is being built without lawful authority; that it will be a nuisance in

law and in fact; that it will obstruct, impair, and injuriously modify the navigation of the East river; and that the defendants be enjoined from building it at the height of 135 feet above mean high water, or at any other height that shall obstruct, impair, or injuriously modify the navigation of said river. The bill alleges that the bridge is being so built that it will, at the center, have a height of 135 feet only above mean spring high-water mark, with an allowance of two feet rise and fall by reason of the expansion and contraction of the suspended cables; and that, in a large proportion of the vessels which will pass and repass the location of the bridge, the masts exceed 135 feet in height.

This case comes up now, for final hearing, on pleadings and proofs. It was before this court, on a motion for a preliminary injunction, in August, 1867, (13 Blatchf. 469,) and the motion was denied. The decision of Judge Johnson covers nearly all the points now presented, and the controlling facts are not materially varied from those on which his decision was based. Much testimony has been taken, addressed to the question whether the bridge will in fact obstruct or impair navigation, and to what extent and in what manner. But, in the view on which the case must be decided, such testimony is unimportant.

Passing by the objection taken by the defendants, that the plaintiff has no standing in court to obtain the relief asked for, because it does not appear that he has sustained, or is about to sustain, any special damage different from that sustained by the rest of the public, and therefore cannot maintain a private action for a public nuisance, and because he is only a lessee of warehouses from year to year, it is clear that as the defendants have the authority of congress, and of the legislature of the state of New York, for the construction of the bridge in the manner in which it is constructed, it is a legal structure, and cannot be held to be a public nuisance. This is fully considered in the decision referred to. In addition to the authority to build the bridge conferred by the act of the legislature of New York passed April 16, 1867, (Laws of New York, 1867, c. 399, p. 948,) supplemented by subsequent acts of the same legislature to the same effect, congress, by an act approved March 3, 1869, (15 St. at Large, 336,) declared such bridge, when completed in accordance with said state act of 1867, to be "a lawful structure and post road for the conveyance of the mails of the United States." The state act of 1867 contains the following provision:

"Nothing in this act contained shall be construed to authorize, nor shall it authorize, the construction of any bridge which shall obstruct the free and common navigation of the East river."

The act of congress contains this provision:

"Provided that the said bridge shall be so constructed and built as not to obstruct, impair, or injuriously modify the navigation of the river; and, in order to secure a compliance with these conditions, the company, previous to commencing the construction of the bridge, shall submit to the secretary of war a plan of the bridge, with a detailed map of the river at the proposed site of the bridge, and for the distance of a mile above and below the site, exhibiting the depths and currents at all points of the same, together with all other information touching said bridge and river as may be deemed requisite by the secretary of war to determine whether the said bridge, when built, will conform to the prescribed conditions of the act not to obstruct, impair, or injuriously modify the navigation of the river."

It also further enacted—

"That the secretary of war is hereby authorized and directed, upon receiving said plan and map, and other information, and upon being satisfied that a bridge built on such plan, and at said locality, will conform to the prescribed conditions of this act, not to obstruct, impair, or injuriously modify the navigation of said river, to notify the said company that he approves the same, and upon receiving such notification the said company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But until the secretary of war approve the plan and location of said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced; and should any change be made in the plan of the bridge, during the progress of the work thereon, such change shall be subject likewise to the approval of the secretary of war."

The third section of the act provided that congress should "have power at any time to alter, amend, or repeal this act." The views taken in the decision of Judge Johnson, and in which I concur, were that if the steps pointed out in the act of congress have been taken, there is the direct authority of congress for proceeding in the construction of the bridge in conformity with the approved plans, and a conclusive determination that the navigation of the river will not thereby be obstructed, impaired, or injuriously modified, unless congress does not possess the power thus to legislate, and that congress does possess that power. The cases of *State v. Wheeling Bridge Co.* 18 How. 421, and *The Clinton Bridge*, 10 Wall. 454, are conclusive as to the existence of such power in congress. The Wheeling bridge in fact impeded steam-boat navigation, yet congress declared it to be a lawful structure, and the supreme court held that such act was a legitimate

exercise of the power of congress to regulate commerce. *South Carolina v. Georgia*, 93 U. S. 4, 12.

Judge Johnson held that the authority of the act of congress had been pursued. He overruled the objection that the notice to the company was not under the hand of the secretary of war himself, and held that, as the secretary had approved in writing, under his own hand, of the plan of the bridge, it was sufficient for him to direct notice of such approval to be given to the company. I concur in these conclusions.

The bridge has been constructed in accordance with the plans and terms approved by the secretary of war. By the act of the legislature of New York passed May 14, 1875, (Laws of New York, 1875, p. 290,) the bridge in its entirety, as then contemplated, was declared to be a public work, and the state of New York gave its sanction to it.

In the case of *People v. Kelly*, 76 N. Y. 475, the court of appeals of New York held that congress could authorize the construction of this bridge, although it would, to some extent, interfere with navigation; that the determination of congress as to the extent of the interference which would be permitted was conclusive; that congress might devolve upon the secretary of war the power to approve or prescribe the plan for the bridge; that the provisions of the act of congress in this case were within the powers of congress; that the secretary of war could convey the notification in any way which would be effectual; and that the notice given in this case, through one of his subordinates, was sufficient. A point was taken in that case, as it is now taken in this, that congress could not devolve on the secretary of war the power which it did. On that subject the court of appeals said:

"Congress, in the exercise of its power to regulate commerce and navigation, could itself approve the plan of the bridge, or it could prescribe a mode in which it could be done. Hence, it was competent for it to devolve upon the secretary of war the power to approve or prescribe the plan for the construction of the bridge. By so doing it did not abdicate its power, but provided an agency, as it does in most other cases, for the complete and practical exercise of its power; and it still retained control of the whole subject, by the power expressly reserved, at any time to alter, amend, or repeal the act."

These views are sound and controlling. In the same case the court of appeals said:

"After the passage of the act of 1875 it was no longer necessary so to construct the bridge as in no degree to obstruct the free and common navigation of the river, as required by the act of 1867. At the time of the passage of the

act of 1875, a plan of the bridge, approved under a public act of congress, had for some years been adopted and acted upon. That plan showed precisely to what extent the bridge would obstruct navigation upon the river, and more than five millions of dollars had been expended upon the bridge. The plan and character of the bridge must be assumed to have been known to the legislature, and the act of 1875 is an act providing for the completion of the bridge then in course of construction, and the trustees to be appointed under that act are required to complete that bridge. There was then a legislative approval and sanction of the bridge as then being constructed according to the plan prescribed by the act of congress, and thereafter the trustees were required only to conform to the plan thus adopted and approved in the construction of the bridge. So long as there is no departure from such plan the structure could not be assailed as an obstruction to navigation. What is thus sanctioned by both the state and national legislatures cannot be a nuisance or otherwise unlawful."

As to the guys or stays which were attached to the main span of the bridge, and hung below the bottom chords, they were used only in construction, and were not to be permanent; and it is not at all clear that they were a violation of the conditions prescribed by the secretary of war. Moreover, they have been removed.

The bill must be dismissed, with costs.

NOTE. The power of congress to authorize a bridge across a public river navigable from the sea is paramount. *Silliman v. Hudson Riv. Br. Co.* 4 Blatchf. 83, 409; *North River Steam-boat Co. v. Livingston*, 3 Cow. 713; *People v. Rensselaer, etc., R. Co.* 15 Wend. 113. See *Clinton Bridge Case*, Woolw. 150.—[Ed.]

KENSETT v. STIVERS and others.

(Circuit Court, S. D. New York. November 8, 1880.)

1. INTERNAL REVENUE—ERRONEOUS OR ILLEGAL TAXATION—INJUNCTION.

Where a tax is assessed, upon manufactured articles liable to duty, by a person in office and clothed with authority over the subject-matter, its collection cannot be restrained by injunction in any court of equity of the United States, however erroneously or illegally it has been assessed.

2 JURISDICTION AND POWER OF ASSESSORS.

The power of assessing taxes on tobacco against tobacco manufacturers necessarily covers the question of quantity, rate of tax, amount of tax, and persons liable to tax, and mistakes in any of these respects are only errors, and not such absence of jurisdiction as to make the proceedings wholly null and void.

3. STATUTORY PROHIBITION.

Section 10 of the act of congress of March 2, 1867, (14 St. at Large, 475,) amendatory of section 19 of the act of congress of July 13, 1866, (14 St. at Large, 152,) contains a provision additional to the provisions of the latter statute, as follows: "And no suit for the purpose of restraining the assessment or collection of a tax shall be maintained in any court." *Id.*

4. RIGHTS PRESERVED UNDER STATUTE.

Section 34 of the act of congress of March 2, 1867, provides as follows: "This act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts." *Held*, that under this section all rights are saved; but that the right to a remedy is merely a remedy which congress could take away without affecting any "right accrued."

In Equity.

Enoch L. Fancher, for plaintiff.

Edward B. Hill, Asst. Dist. Atty., for defendants.

BLATCHFORD, C. J. The defendant Stivers is the collector of the internal revenue of the United States for the eleventh collection district in the state of New York, residing at Middletown, Orange county, New York; the defendant Corwin is his deputy collector, residing at Newburgh, in said county; and the defendant Blake is the collector of the internal revenue of the United States for the third collection district in the state of New York, residing in the city of New York. All of the defendants and the plaintiff are citizens of the state of New York. The plaintiff resides in the town of Cornwall, Orange county, New York, and is the widow of Thomas Kensett, late of Baltimore, Maryland, deceased. Before her intermarriage with Kensett she was the wife of Marquis D. L. Sharkey, from whom she obtained a decree of divorce *a vinculo matrimonii* on the first of June, 1870, in the supreme court of the state of New York, which decree is in force. She was born in December, 1843, and was married to Sharkey in April, 1864. Sharkey at some time commenced some business arrangements with the firms hereinafter mentioned, or one of them, engaged in the tobacco trade in the city of New York. She never knew the particulars of such arrangements except that one day Sharkey told her that he had invested in her name, in the tobacco business, \$15,000, because as there were judgments against him he could not, with safety, use his own name, and he compelled her by threats to sign a paper, January 1, 1866, which he said was a special partnership paper of the firm of Alexander Ross & Co. If Sharkey ever made such investment it was of his own money, and not from any money belonging to her. She had no separate estate, and she did not sign said paper freely, nor willingly assent to such use of her name, nor has she ever had anything to do

with said tobacco firms, or either of them, nor has she ever received or claimed any interest therein, or any benefit therefrom. The said firm of Alexander Ross & Co. was never advertised according to law, so as to become a special partnership, and she was not held out as a partner therein, and the same never became, as to her, a general partnership. About 14 years have elapsed since she heard anything concerning the said affairs, but in 1880, while she resided in Cornwall, a notice as follows was left at her mother's residence by the defendant Corwin:

"List November, 1866. Div. Fourth Dist. N. Y. Notice of taxes assessed. United States Internal Revenue. Office of the Collector of Internal Revenue, Eleventh District, State of New York, July 2, 1880.

"*Mrs. Gertrude W. Sharkey, now Mrs. Thomas Kensett, Cornwall on the Hudson:*

"The tax assessed against you and others, for deficiencies in tobacco manufactured, sold, or removed, without payment of tax, from November 1, 1865, to October 31, 1866, amounting to \$233,660.17, is due and payable on or before the twelfth day of July, 1880, and unless paid within that time it will become my duty to collect the same, with a penalty of 5 per centum additional, and interest at 1 per centum per month. JOHN CORWIN, Deputy Collector.

"Office, No. 130 Water street, Newburgh."

She consulted counsel, who was informed by Corwin that he had received an order from the defendant Stivers to collect the tax out of the property of the plaintiff. Stivers informed her counsel, on September 7, 1880, that the assessment was certified to him by the defendant Blake, and was as follows:

S. N. Daily, John Vant, J. J. Yates, Mrs. G. W. Sharkey, Alex. Ross, and David O'Neil, doing business under the firm names and styles of Alex. Ross & Co., Ross, Storms & Co., and David O'Neil, at 206 and 208 Fulton street.

Deficiencies of tobacco manufactured, sold, or removed, without payment of tax, from November 1, 1865, to October 31, 1866, viz.:

Chewing tobacco, 263,482 lbs., 40c.	-	-	-	-	\$105,392 80
Smoking tobacco, 102,535 lbs., 35 and 15c.	-	-	-	-	26,652 45
Stems tobacco, 105,286 lbs., 15c.	-	-	-	-	15,792 90
Shorts, August, September, and October, 26,451 lbs., 30c.					7,935 30
					<hr/>
					\$155,773 45
Additional tax, 50 per cent.	-	-	-	-	77,886 72
					<hr/>
					\$233,660 17

The persons and firms against whom said assessment is made were not joint dealers in the tobacco business, or any other business, in

1865 and 1866, but said firms and O'Neil had several distinct and separate business interests, and were not jointly concerned in the manufacture or sale of tobacco. The plaintiff was never a partner, or jointly interested with any of said persons or firms, and never had any interest in any tobacco or tobacco business at 208 Fulton street, New York, or elsewhere. Until July, 1880, the plaintiff had no information of said tax, and no knowledge that her name was connected with it. There is no record concerning said tax in the office of the defendant Blake, and the pretended record thereof was got up and sent to Washington by a collector or assessor, with certain books and papers seized at 208 Fulton street, New York, now with the commissioner of internal revenue. Stivers, though requested, has refused to revoke said order of collection, and any personal property which the plaintiff has, which Corwin can find, will be liable to seizure unless the tax be paid. The stock of tobacco at 208 Fulton street, owned by one or more of said firms, and worth \$60,000, was, soon after the assessment of said tax, seized by the collector of internal revenue in New York, and sold, on account of the non-payment of said tax, and a large sum was realized by the United States therefrom. At the time there was about \$20,000 worth of tobacco stored in said store, owned by the plaintiff's father, which was included in said seizure and sale, though none of the persons against whom said tax was assessed had any interest therein. Another large sum has been realized by the collector of another internal revenue district on said tax, but no credit is made for said sums on the claims so presented against her. A farm in which Sharkey had an interest was, before her divorce, sold by the collector of internal revenue for the twenty-third district of New York, on account of said tax. Sharkey's conduct towards her was coercive and cruel, and she had no opportunity or power to resist his improper practices in respect of said partnership paper or tobacco business, and if at any time her name appeared in any of said matters, it was without her free will or voluntary consent. What means she has from the estate of Mr. Kensett are paid over to her by trustees under his will, and are necessary for her support, and that of a daughter, four years old. She has applied to the commissioner of internal revenue for a remission of said tax, on her affidavit of the foregoing facts. He declined, on the thirtieth of September, 1880, to stay the proceedings of the defendant Stivers. Her grievance cannot be remedied by any action at law, as she cannot pay the large amount of the tax and sue to recover it back, nor

can she, without leading to a multiplicity of suits, allow her property, whenever seized for said tax, to be sold, and bring suits at law to recover its value, for she has property in different collection districts, and the defendants have caused transcripts of said tax to be transferred to different collection districts, with a view to its collection from her property in said districts, and the same has thereby become a cloud upon her interests in real estate in the state of New York and in the state of Maryland.

The plaintiff has filed a bill in equity in this court against the above-named defendants, setting out the foregoing allegations, and praying for a decree adjudging that the said tax or assessment is illegal and void as against her, and that the defendants have no lawful right to enforce or attempt to collect the same as against her property; and that they, and each of them, be perpetually enjoined, as collectors of United States internal revenue, from taking any steps or proceedings to enforce or collect the said tax from any of her property, and from causing or permitting a transcript of said tax to be sent to any other collector of internal revenue for that purpose.

The defendants demur to the bill, for that it does not make out a case for equitable relief, and that this court is forbidden, by section 3223 of the Revised Statutes of the United States, to grant the relief prayed in the bill, or any relief in the premises, and therefore cannot entertain the bill, or grant any relief thereon to the plaintiff.

The bill in this case is a bill to restrain the collection of a tax which purports to have been assessed under the internal revenue laws. It has no other object or purpose. A decree, as prayed for, adjudging the tax to be void as against the plaintiff, and that the defendants have no lawful right to attempt to collect it as against her property, is merely preliminary to the relief by perpetual injunction, which is prayed, and would be futile, for any purpose of this suit, unless followed up by a perpetual injunction.

The internal revenue act of July 13, 1866, (14 St. at Large, 152,) provided (section 19) as follows:

"No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provision of law in that regard, and the regulations of the secretary of the treasury established in pursuance thereof, and a decision of said commissioners shall be had thereon, unless such suit shall be brought within six

months from the time of said decision, or within six months from the time the act takes effect: provided, that if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within 12 months from the date of such appeal."

By section 10 of the act of March 2, 1867, (14 St. at Large, 475,) it was enacted that section 19 of the said act of 1866 be amended "by adding the following thereto:" "And no suit for the purpose of restraining the assessment or collection of a tax shall be maintained in any court." The word "any" appears to have been inserted by the revisers. The enactment in section 3224 ought not to be construed as having any other meaning than it had when, after the act of 1867, it formed a part of section 19 of the act of 1866 by being added thereto. The first part of section 19 related to a suit to recover back money paid for a "tax alleged to have been erroneously or illegally assessed or collected," and the section, after thus providing for the circumstances under which such a suit might be brought, proceeded to say that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." By all the rules for construing statutes the addition of 1867 may properly be construed as *in pari materia* with the previous part of the section, and as relating to the same subject-matter. As the "tax" spoken of in the first part of the section is a "tax alleged to have been erroneously or illegally assessed or collected," and as, though an allegation of illegality or error is made, the thing is still called, *sub modo*, a "tax," in the first part of the section, it would seem proper to hold that when the section speaks of tax in the addition it means a thing which is in a condition to be collected as a tax, and is claimed by the public authorities to be a tax, although on the other side it is alleged to have been illegally or erroneously assessed. This would dispose of the view that section 3224, in speaking of a "tax," means only a legal tax, and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.

But the question as to the proper construction of the statute has come up in several cases.

In *Howland v. Soule*, Deady, 413, in 1868, in the circuit court of the United States for the district of California, a bill was filed to restrain a United States collector of internal revenue from collecting by distraint a tax assessed against a manufacturer, on the ground that the tax was illegal, and therefore no tax. The inhibition of the

statute was set up, and the court dismissed the bill. Judge Deady said:

"This is a tax within the meaning of the statute. It has the form and color of a tax. It was assessed upon manufactured articles liable to a duty, by a person in office and clothed with authority over the subject-matter. The tax has come to the defendant for collection in due course of office and from the proper authority."

In *Pullan v. Kinsinger*, 2 Abb. (U. S.) 94, in 1870, in the circuit court of the United States for the southern district of Ohio, before Judge Emmons, a bill in equity was filed by certain distillers to obtain an injunction restraining the defendants from collecting a tax which, as internal revenue officers of the United States, they claimed to collect from the plaintiffs as distillers. The bill was demurred to and was dismissed. It claimed that the government surveyors had fixed an erroneous capacity for the distillery under the act of July 30, 1868, and had thus given the assessors a fictitious basis for taxation, and that all taxes on the actual capacity had been paid. It was insisted that the assessor had thus exceeded his jurisdiction; that the assessment was void; and that, therefore, the inhibition of the statute against an injunction did not apply. On the part of the defendant it was claimed that the surveyors and the assessor had jurisdiction of the subject; that their proceedings were not nullities, though they might be irregular and illegal; and that the statute applied. The court sustained the demurrer solely on the ground that it had no right to restrain the collection of a federal tax assessed by an officer having jurisdiction of the subject, be it never so irregular or erroneous. It says:

"It is sufficient that a statute has authorized the assessor to entertain the general subject of taxation; that it was in fact entertained, and a judgment, lawful or unlawful, was rendered concerning it. So far as this judgment was concerned, lawful or unlawful, is deemed quite immaterial."

The view taken by the court was that the general subject of taxing distillers, and the judicial duty of determining, either upon view or inquiry or evidence, what persons and what things were within the law, was imposed upon the assessor. Various cases were cited to sustain the decision. One was a case where the assessment of a woman not liable to highway duty was held not to be a void proceeding. Another was a case where a person not a member of a military troop was fined by a court martial, and, his property being seized under a warrant, he brought replevin for it, and it was held he could not main-

tain the suit. These classes of decisions recognize the principle that, if the proceeding is a nullity, the statute against an injunction has no application. But the proceeding is held not to be a nullity where there is general jurisdiction in the class of cases involved, and where the tribunal has judicially determined that the case is within it.

In the present case it is not pretended that there was not general jurisdiction of this subject of assessing taxes on tobacco against tobacco manufacturers. This power necessarily covered the questions of quantity, rate of tax, amount of tax, and persons liable to tax as tobacco manufacturers, in respect to the tobacco under adjudication. Mistakes in any of these respects were only errors, and not such absence of jurisdiction as to make the proceedings wholly null and void. The bill admits that Sharkey had business arrangements with the firms, or one them; that they were engaged in the tobacco trade in the city of New York; that the plaintiff was told that money was invested in her name in such business; that she signed a paper January 1, 1866, which appeared to be a partnership paper of the firm of Alexander Ross & Co.; that a tax was assessed against her and others as doing business under the firm name of Alexander Ross & Co., and other names, for tobacco manufactured, sold, or removed, without payment of tax, from November 1, 1865, to October 31, 1866; and that there is a record of the assessment of such tax in the office of the commissioner of internal revenue. This state of facts is sufficient to bring this case within the decision in *Pullan v. Kinsinger*.

In *Robbins v. Freeland*, 14 Int. Rev. Rec. 28, in 1871, in the circuit court of the United States for the eastern district of New York, a bill was filed to restrain a collector of internal revenue from collecting an income tax assessed against the plaintiff, on the ground that the act of congress imposing it was unconstitutional and void, and that the plaintiff had no remedy at law sufficient to indemnify him if the collector was allowed to distrain and sell his property. The defendant relied on the inhibitory statute and the decision in *Pullan v. Kinsinger*. Judge Benedict held that the court was forbidden by the statute from entertaining the application.

In *Delaware R. Co. v. Prettyman*, 17 Int. Rev. Rec. 99, in the circuit court of the United States for the district of Delaware, a railroad company sought to enjoin the collection of a tax assessed by an assessor of United States internal revenue on interest money payable by it on its bonds, and on dividends of profits made by it. It was

claimed that the tax was unauthorized by law. The inhibitory statute of 1867 was invoked by the defendant, who was a collector of internal revenue, and the court dismissed the bill. Judge Bradford cited the two cases, before referred to, of *Pullan v. Kinsinger* and *Robbins v. Freeland*, and held that the suit was forbidden by the act of congress. He said:

“Whenever an assessor, in the exercise of his office, assesses a tax which in his discretion and judgment he is authorized by an act of congress to assess, he being bound from the nature of his office to inquire and determine whether the thing in question is or is not the subject-matter of taxation, he is then exercising a legitimate jurisdiction over the subject-matter of taxation, and a tax thus assessed, although it may afterwards in other proceedings be declared unauthorized, comes within the description and meaning of that tax, the payment of which congress has forbidden to be resisted by bills of injunction.”

He held that the power and duty of determining whether the interest and dividends in question were liable to taxation were confided by statute to the assessor; that, when the assessor assessed the tax in question, he put into operation the power of determining whether such interest and dividends were properly the subject-matter of taxation; and that he thus exercised his jurisdiction over a matter which was manifestly within it. In the present case it is contended that, although the assessor may have had jurisdiction over the subject-matter, he had no jurisdiction over the person of the plaintiff, for the reasons stated in the bill. But, under the law, it was the duty of the assessor to inquire and determine *who* was subject to taxation, quite as much as to determine any other question. A mistake as to the person, made in the exercise of such jurisdiction, does not oust the jurisdiction any more than any other error does.

In *U. S. v. Black*, 11 Blatchf. 543, in 1874, in this court, Judge Shipman, referring to the inhibitory statute, says that under it “payment must be made, at all events, whether the tax was justly or unjustly levied.”

In *Kissinger v. Bean*, 7 Biss. 60, in 1875, in the circuit court of the United States for the eastern district of Wisconsin, the commissioner of internal revenue had assessed against the plaintiff a tax on distilled spirits, and the plaintiff filed a bill against the collector to restrain its collection. The court refused an injunction, on the ground that the inhibitory statute applied. The plaintiff claimed that he was not individually liable to the tax, because the business had been carried on by a corporation in which he was a stockholder. Judge Dyer held that it must be clear that the proceeding was an

absolute nullity, in order to sanction the interference of the court, and that if the plaintiff was within a class of persons against whom assessments might be made, the court could not interfere, although the proceedings were even so irregular or erroneous.

In *U. S. v. Pacific R. R.* 4 Dill. 69, in 1877, in the circuit court of the United States for the eastern district of Missouri, Mr. Justice Miller says:

"We have, even without the aid of an act of congress, refused to grant an injunction to stay the collection of taxes under any circumstances, and this upon the broad ground applicable to this case, that the taxes of the government are essential to the support and existence of the government; and we have always refused to permit any interference with their collection by injunction. The principle involved is this: that by setting up other debts and cross-actions and counter-claims against the government it would in effect be placing the existence of the government at the mercy of any person who chose to set up his right in this way, and thus hinder the collection of taxes. Since that decision was originally made the statutes passed by congress go very strongly in that direction. Congress has passed a statute expressly forbidding the granting of an injunction for that purpose. It has passed a statute for the correction of errors of the assessing and collecting officers of the government, which the supreme court has said, in two or three cases, is a complete and perfect system. If the tax is unjustly assessed, or supposed to be unjustly assessed, the remedy allowed is an appeal to the commissioner of internal revenue. If he decides against the party, or fails to decide within six months, the party injured can pay his taxes and go into court and sue for this amount, and recover it back if he is wrongfully assessed, the court being unprejudiced by any action of the commissioner. The statute says he may bring his suit to recover it back, and he will get it back if the court so decides. The time for bringing such a suit is limited, so as to have no delay in settling the matter. It must be within 12 months—6 months after the commissioner has decided, and 12 months after the appeal has been taken. And we have said over and over again, in our courts, that that was a complete and exclusive system of correctional justice in regard to the collection of taxes unjustly assessed; that it was the only system; and by that ruling we abide. There can be no such thing as obstructing and objecting to the payment as in the case of adjusting the accounts of individuals."

In *Alkan v. Bean*, 23 Int. Rev. Rec. 351, in 1877, in the circuit court of the United States for the eastern district of Wisconsin, a bill was filed against a collector of United States internal revenue to restrain the collection of a tax which had been assessed against a distiller from whom it was alleged the plaintiff had bought the distillery premises without notice of any claim by the government on the premises for taxes unpaid by the vendor. It was also alleged that the assessment was irregular and void. The inhibitory statute was set

up, and the court refused an injunction. Judge Dyer cited with approval what was said by Judge Deady in *Howland v. Soule*, and by Judge Bradford in *Delaware R. Co. v. Prettyman*, and by Judge Shipman in *U. S. v. Black*, and said that he regarded the observations of the supreme court in *Clinkenbeard v. U. S.* 21 Wall. 65, as implying that the suit before him could not be maintained.

Against this current of authority the only case cited, or which I have been able to find, in which an injunction has been maintained to restrain the collection of an internal revenue tax, is that of *Frayser v. Russell*, 3 Hughes, 227, in 1878, in the circuit court of the United States for the eastern district of Virginia, before Judge Hughes. The head-note, by Judge Hughes, is this:

"Though it is true that courts of equity of the United States cannot enjoin an officer of the United States from collecting a tax, yet there are circumstances under which such collecting officers may be enjoined from claiming moneys of citizens and levying for them as if for taxes."

It is sufficient to say that the circumstances of the present case do not bring it within the circumstances of that case; that that case does not impugn the principles laid down in the other cases before cited; and that, if it did, the weight of authority is against it.

It is contended for the plaintiff that the inhibitory provision found in the act of March 2, 1867, does not apply to this case, for the reason that the right to bring this suit is saved by section 34 of the same act of 1867. That section provides as follows:

"This act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved; and all suits and prosecutions for acts already done in violation of any former act or acts of congress relating to the subject embraced in this act may be commenced or proceeded with in like manner as if the act had not been passed; and all penal clauses and provisions in existing laws, relating to the subjects embraced in this act, shall be deemed applicable thereto."

It is contended for the plaintiff that, as the alleged deficiencies occurred before November 1, 1866, she had, as the law stood on that day, and before the act of 1867, a right of action to restrain the collection of the tax, because there was then no inhibitory statute, and that such right of action is a "right accrued" under an act or acts prior to the act of 1867, and so was saved by section 34 of that act; and that this suit is a suit for an act done in violation of an act or acts prior to the act of 1867, relating to a subject embraced in that act, and so may, under section 34, be commenced in like manner as if that act had not been passed.

It does not distinctly appear by the bill in this case that the tax in question was assessed before the act of 1867 was passed. But, even if it be assumed that it was, the right to bring this suit cannot be held to have been a right saved by section 34 of the act of 1867. The suit was not brought before the act of 1867 took effect. If the remedy existed because the assessment had been made, the remedy had not attached to any vested right. There was no right except the right to the remedy, and the right to the remedy was only the remedy. Congress could take away the remedy without taking away any "right accrued." *Memphis v. U. S.* 97 U. S. 293, 297, 298. Construing the inhibitory provision in the act of 1867 as taking away any right, if it existed before, to bring this suit, is not construing it so as to affect any "act done" or "right accrued" under any former act, in the sense of those expressions as used in section 34 of the act of 1867. Nor can this suit be held to be a suit for an act done in violation of an act prior to the act of 1867, relating to a subject embraced in that act, within the meaning of section 34 of the act of 1867.

There is another view. The act of 1867, including section 34, is repealed by section 5596 of the Revised Statutes, because portions of that act are embraced in the Revised Statutes, and in lieu of section 34 the provisions of section 5597 of the Revised Statutes are in force. That section provides as follows: "The repeal of the several acts embraced in said Revision shall not affect any act done, or any right accruing or accrued, or any suit or proceedings had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner as if said repeal had not been made." To sustain this demurrer does not affect any act done before the act of 1867 took effect. It does not affect any right accrued before that time. The right to apply for an injunction as a remedy, is not such a right as the statute means. It is a mere remedy. In *Terry v. Anderson*, 95 U. S. 628, 633, it is said: "As to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain." In regard to the subject-matter of this suit it has been repeatedly held that the means provided by statute, and left in force, for enforcing any right of the plaintiff, without the existence of the remedy by injunction, are adequate means, in the sense of this rule. To recur to section 5597, this suit was not commenced before the Revised Statutes were enacted. All rights of the plaintiff in any sense in which the word "right" is used in section 5597 continue, although the right to the

remedy by injunction does not continue, and to say that such remedy does not exist, is not to say that any "right" of hers is not to be enforced in the same manner as before the Revised Statutes were enacted.

The demurrer is allowed, with costs.

GREGORY v. CHICAGO, MILWAUKEE & ST. PAUL R. R.

HARRIS v. SAME.

MEIGHEN v. SAME.

(Circuit Court, D. Iowa, N. D. 1882.)

1. PRACTICE—PRODUCTION OF BOOKS, ETC.

In requiring the production of books or writings in evidence in actions at law, federal courts are not governed by the provisions of state statutes, but by the provisions of section 724, Rev. St.

2. SAME—DISCRETION OF COURT.

In ordering the production of books, etc., in evidence, the court will exercise its discretion, following the practice, in such cases, in chancery.

At Law.

LOVE, D. J. We are not governed, as counsel seem to suppose, by the provisions of the Iowa Code in determining this motion, but by the following provisions of the act of congress:

Section 724, Rev. St. "Power to order production of books and writings in actions at law."

"In the trial of actions at law the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue in cases under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery.

"If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendants as in cases of nonsuit; and if a defendant fails to comply with such order the court may, on motion, give judgment against him by default."

From this provision it is clear that the plaintiff's motion cannot be denied. But how, when, and where the books, etc., shall be produced must be determined by the sound and just discretion of the court. To order the books of a corporation, or any great business firm, to be brought from a distant place, where they may be con-

stantly needed, to the place where the court is held, would be a practice in the highest degree inconvenient; neither would the court order the books of a firm or corporation to be taken from the possession of the owners, and placed in the custody of any person not interested in their safety and preservation. The right of a litigating party is to inspect, to examine, and take copies, with view of securing information, and offering their contents in evidence. This right the law secures to him, and the court will order it to be done in such a way as to prejudice as little as possible the owners of the books. The owner of books in which he has kept his accounts, and which he may need for daily and hourly use, is just as much entitled to their custody as he is entitled to the possession and use of any other personal property. It would be most prejudicial and unjust to order a litigant to bring his books from a distant place, where they are in constant use, and deliver them to some officer of the court for the convenience of an adversary party. If such were the rule, a foreign insurance company or railroad corporation or private firm might be compelled, under penalties of contempt and default, to bring their books from far-distant states, and even from beyond the seas, at their own expense, and to their grievous prejudice, for the use, benefit, and convenience of their adversaries. It will be seen, by examining the foregoing provision, that the court is to govern its discretion by the practice in such cases in chancery. The practice in equity has been long established, and the court will make an order in strict pursuance of that practice.

As to means by which the order shall be enforced, the rule quoted above speaks for itself. But, even in the absence of such a rule, the court would find a way to enforce obedience to its orders by a party litigant before it.

ORDER.

Let the plaintiff, his solicitors, and agents be at liberty, at all reasonable times, upon giving reasonable notice, to inspect and peruse at the office of the defendant company, or elsewhere, the books, papers, and vouchers referred to in the plaintiff's application as containing evidence pertinent to this case, the same being in the defendant's possession, custody, or power, and take copies thereof and abstracts therefrom, as they shall be advised, at the plaintiff's expense; and let the said defendants produce any designated books, papers, or vouchers before any competent officer taking depositions, on due notice, at the plaintiff's instance, at the town or city or place where

said books, papers, or vouchers may be kept in custody, in order that any copies, abstracts, or extracts taken under this order may be compared, verified, and proved, so as to be offered in evidence

It is further ordered that, in order to entitle himself to have such books, papers, and vouchers produced before such examining officer, the plaintiff shall designate the books, papers, or vouchers required, and give reasonable notice of the time and place when and where the same shall be produced.

See *Geyger v. Geyger*, 2 Dall. 332; *Thompson v. Selden*, 20 How. 194; *Maye v. Carberry*, 2 Cranch, C. C. 336; *Bank of U. S. v. Kurtz*, Id. 342; *Hilton v. Brown*, 1 Wash. C. C. 298; *Bas v. Steele*, 3 Id. 381; *Dunham v. Riley*, 4 Id. 126; *Vasse v. Mifflin*, Id. 519; *Jaques v. Collins*, 2 Blatchf. 23; *Iasigi v. Brown*, 4 Curt. 401.

McINTYRE and others v. THOMPSON and others.

(Circuit Court, W. D. North Carolina. December Term, 1881.)

1. REAL ESTATE—TITLE BY PRESCRIPTION.

A sheriff's deed is color of title, and continuous possession thereunder of the lands therein described for seven years, under known and visible boundaries, establishes title for the purposes of an action to recover land lying in the state of North Carolina, against everybody but the state; and title may be shown out of the state, if individuals have had possession and used such lands as their private property for 30 years, under known and visible lines and boundaries. As against the state, it is not necessary to show that such adverse possession was continuous, or that there was connection and privity between the holders.

2. COLOR OF TITLE.

Color of title is that which in appearance is title, but which in reality is no title. Even under a void and worthless deed, it is received as evidence of claim adverse to all the world, and mere notice of a better title will not prevent the operation of an adverse possession under it. It is a question of law to be determined by the court.

This is a civil action to recover land. The evidence and the legal questions presented in the argument are stated in the charge of the court.

W. H. Bailey and Walker & Burwell, for plaintiffs.

Bynum & Grier and Jones & Johnston, for defendants.

DICK, D. J., (*charging jury*.) In a long experience at the bar I have often observed that, in warmly-contested and protracted trials, many immaterial and irrelevant matters will find their way into the controversy. Such matters always tend to confuse and perplex,

and sometimes to prejudice, the minds of jurors. The strict rules of evidence rigidly enforced will not always prevent such a condition of things. The practice of the courts in this state allows great latitude to counsel in the management and argument of a cause, and I am not disposed to restrict or interfere with the well-recognized rights and privileges of attorneys. I know what are the rights and duties of the court, and I will now proceed to divest this trial of all matters which I regard as immaterial and irrelevant to the merits of the case, so that your minds may be directed to the material questions in controversy.

In the examination of Mr. Sumner, one of the witnesses for the plaintiffs, he stated that he was a duly-authorized agent in the prosecution of this action, and he had agreed with the plaintiffs to pay all costs and incidental expenses of the trial, and he was to receive one-half of the lands and damages that might be recovered.

After the argument had commenced, and one of the counsel for the plaintiffs had addressed the jury, one of the counsel for the defendants, in opening his argument, made a motion to dismiss the action, on the ground that it was tainted by a champertous contract between the plaintiffs and their agent. The motion was not then entertained by the court, as it was not made in apt time. The counsel then requested the court, in the charge to the jury, to define the crime of champerty, and charge the jury that the said agent was guilty of the said offence. The definition of the offence given by the learned counsel was correct.

At the common-law if a person officiously interfered in a suit, in which he had no present or prospective interest, to assist one of the parties against the other, with money or advice, without any authority of law, he was guilty of the crime of maintenance. Champerty is an aggravated species of maintenance. It is a bargain with the plaintiff or defendant (*campum partire*) to divide the land or other matter sued for between them if they prevail at law, the champertor undertaking to carry on the suit at his own expense. I have given the definition requested, but I decline to charge you as to the guilt of the agent, for the matter alleged is a crime at common law. I regard it as one of the highest duties of a judge not to pronounce a judgment or opinion as to the guilt of a person, even in the most trifling case, until he has had an opportunity in due course of law to make explanation or defence. Even if there should be a champertous consideration in the contract between the plaintiffs and their agent, it does not affect the merits of this action, as we are not called upon to enforce or invali-

date such contract. The agent is not a party of record, and the plaintiffs have a right to agree to pay him for his services as much as they deem proper. This court has no jurisdiction of the crime of champerty, and indictments for this offence are scarcely ever found in the practice of the courts. In the civil department of the law it is sometimes referred to as affecting contracts, and I believe that it is generally agreed, both in courts of law and equity, that any contract founded on a champertous consideration is illegal and void as being against public justice.

As I have already stated, this question has nothing to do with the merits of this case, and I have only referred to it because it was urged in the argument, and I wish to withdraw it entirely from your consideration.

There is another matter, which was much discussed by counsel while introducing evidence, which I desire now to eliminate from the case. The plaintiffs claim title as the heirs at law of Henry Yates and Archibald McIntyre, who formerly carried on the business of mining under the firm name of Yates & McIntyre. For the purpose of proving their title, the plaintiffs proposed to show that the defendants claimed under Yates & McIntyre, and under a rule of law cannot dispute their title. There is a well-established rule of law in actions for the recovery of land that where both plaintiff and defendant claim title under the same person, neither can deny the title of him under whom both claim. This is not strictly an estoppel, but a rule of the court founded in justice and convenience. The plaintiff offered in evidence a deed executed by a confederate receiver to one L. C. Thompson, showing that the land in controversy was sold under a decree of a court of the confederate states, condemning the land as the property of the heirs at law of Yates & McIntyre, who were residents of the United States, and alien enemies. At the time of the condemnation and sale in November, 1862, the government of the confederate states was a *de facto* government, exercising belligerent rights, and had instituted proceedings against said land to condemn and sell the same as forfeited to said government. The proceedings for confiscation were against the lands and not the owners, and the purchaser of the lands claimed not their title, but one paramount, derived from the sovereign in whom the title had become vested by operation of law.

If the confederate government had been successful in establishing itself as a government *de jure*, the title of the purchaser would have been complete. At the time he made the purchase he was not bound

to look beyond the decree of a court having jurisdiction of the subject-matter, for the exercise of jurisdiction warrants the presumption in favor of a purchaser that the facts necessary to be proved to confer jurisdiction were proved. When L. C. Thompson purchased he acquired a good title, and he had title when he conveyed to the present defendants in 1863; but the proceedings for condemnation and sale, and the title of the purchasers, all became void on the downfall of the *de facto* government. I think the rule of law heretofore stated as to parties in an action for the recovery of land claiming from the same source of title does not apply. The defendants do not claim from the ancestors of the plaintiff, but such title as they once had was derived from the confederate government, and on the downfall of that government they became mere occupants of the land under color of title. As to the possession and color of title of the defendants I will make extended reference hereafter, when I come to consider the issue on this subject.

There is still another matter which I wish to withdraw from your consideration. In 1865 this state was under the military control of the United States. One of the defendants being in possession at that time of the lands in controversy, and being apprehensive that he might be disturbed or dispossessed by the military authority, went to a person who, before the war, had been the agent of some of the heirs of Yates & McIntyre, and proposed to take a lease from him to secure possession against military interference. This person had no authority to act in the matter, as his power of attorney had become void by the death of the grantors. The lease which was executed was not intended by the parties as a *bona fide* lease, but was for the purposes stated, and no effort was ever made to collect the sums agreed upon in said lease. The lease was void, as the pretended lessor had no authority to make it, and it did not have the effect of establishing the relation of landlord and tenant between the defendant and the heirs at law of Yates & McIntyre. You are, therefore, charged not to consider this matter in making up your verdict.

In an action like this a plaintiff can only recover upon the strength of his own title. For the purpose of showing title the plaintiffs introduced a deed from Ward, the sheriff of Gaston county, who, under an execution at law, had sold the lands and executed said deed to the purchasers, Yates & McIntyre, dated September, 1825. The plaintiffs introduced no other deeds showing a chain of title back to the state. For the purpose of showing title out of the state they introduced evidence tending to prove that the lands were occupied as far

back as 1817, by persons who were claiming and using the same as owners, and that such occupation and use were continued up to 1835, when the lands were purchased at sheriff's sale by their ancestors. They also introduced evidence tending to show that such purchasers and their heirs, by themselves, their tenants, and agents, were in possession of said lands until 1861, the commencement of the late civil war.

On the first issue of facts submitted to you under the direction of the court, I charge you that if you are satisfied from the evidence that the plaintiffs, or those under whom they claim, were at any time in the actual and continuous possession of the lands by themselves, or their tenants and agents, for the period of 30 years, under well-known and visible lines and boundaries, you will find this issue in favor of the plaintiffs. In case of such possession it is not necessary to show "color of title." If you find this issue in favor of the plaintiffs, such finding will establish their title, and you need not consider the second and third issues. If you find this first issue against the plaintiffs, then you will proceed to consider the second issue submitted.

Upon this second issue I charge you that the sheriff's deed to Yates & McIntyre was color of title, and if you are satisfied from the evidence that the plaintiffs, or those under whom they claim, had seven years' continuous possession of said lands under known and visible boundaries, then they establish a title against everybody except the state; and title may be shown out of the state if individuals have had possession of the same for 30 years under known and visible lines and boundaries, using them as private property; and the seven years' possession under color of title may be computed as a part of the 30 years' adverse possession against the state. Such occupation and use raise a presumption of a grant. It is not necessary to show that such adverse possession was continuous, or that there was connection and privity between the holders.

The general facts that the state or its agents allowed first one and then another to occupy and use the lands as private property for so long a time, raises the presumption that the state had granted the lands to some one. It is not necessary to fix upon any one as grantee so that the title is out of the state. The presumption of a grant from long possession is not based upon the idea that one actually issued, but because public policy and the quieting of titles make it necessary for the courts to act upon that presumption. You will consider the evidence and apply it to the principles of law which I

have announced as to this issue. If you find this issue against the plaintiffs, then you will proceed to consider the third issue.

If the evidence on this third issue satisfies you that the plaintiffs, or those under whom they claim, had actual and continuous possession of the lands under known and visible lines and boundaries, and under color of said sheriff's deed, for the period of 21 years, then you will find this issue for the plaintiffs, and such finding will establish their title.

If you find any of the three foregoing issues in favor of the plaintiffs, you will then proceed to consider the evidence in the fourth issue, which relates to the title of the defendants.

The defendant Edward Thompson is a mere tenant in possession, claiming for the defendant Jones, who holds the legal title as trustee for the defendants A. B. Magruder and wife. These last-named defendants are the real parties in interest. A. B. Magruder, with the consent of said trustee, made the purchase of said lands from L. C. Thompson, in the fall of 1863, with money arising from the separate estate of his wife, and he alleges that he has had control of the property since the date of the purchase. I will hereafter speak of Magruder as the real defendant. Under the deed from L. C. Thompson he went into possession in the fall of 1863, and remained in actual possession until the fall of 1865. I charge you this said deed was color of title. What is "color of title," is a question of law to be determined by the court.

There was in former times some difficulty in giving an exact signification to the phrase, but I believe that the courts now agree to the definition that "'color of title' is that which in appearance is title, but which in reality is no title." Color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims adversely to all the world, and mere notice of a better title in some other person will not prevent the operation of an adverse possession under such color of title. I have already stated that the title conveyed by the confederate receiver to L. C. Thompson, and conveyed by him to the trustee of the defendant Magruder, was invalidated by the downfall of the confederate government. I am of opinion that the deed from Thompson to the trustee of the defendant Magruder is color of title. The sole question of fact for you to determine on this issue is, has Magruder acquired a complete title by an adverse possession of said lands, under known and visible lines and boundaries, for the period of seven years? The statute of limitations was suspended in this state from the twentieth of May,

1861, until the first of January, 1870, so that Magruder's adverse possession must have been a continuous one from January 1, 1870, to perfect his title, as this action was commenced in September, 1877.

As both plaintiffs and defendants claim under color of title and the statute of limitations, I will say a few words as to the nature and policy of such statutes. "They are now regarded favorably in all courts of justice. They are statutes of repose. Usually they are founded in a wise and salutary policy, and promote the ends of justice." They are dictated mainly by two considerations,—one, that it is public policy to discourage stale claims; and the other, that it is not to be presumed that a person having a right would delay in asserting it for a long period in full view of another's wrongful interference with it. A title acquired by operation of the statute of limitations is as much deserving of the favorable consideration of a court of justice as any other kind of title.

In charging a jury I do not generally recapitulate the testimony offered by the parties, but leave such matters to the recollection of the jury, refreshed and enlightened by the argument of counsel. As to the nature of Magruder's possession I must state some of the testimony in order to show the application of certain principles of law. In the fall of 1865, Magruder quit the actual possession of the lands and rented them to Wesley Mincy for the year 1866. He did not as tenant cultivate the lands, but went off to superintend a mill, leaving his family in possession. Moses Mincy, by permission of his son Wesley, entered on the lands and cultivated a crop, and after that year he was in the sole possession of the lands for several years. There is some conflict in the testimony as to whether Moses Mincy paid rent to the agent of Magruder for the years 1866, 1867, 1868. In 1869 he went to an agent of Magruder and offered to pay rent. The agent declined to receive the rent, saying he was no longer Magruder's agent. Moses Mincy, then acting under some advice which he had received, moved off of the lands and moved back the same day, and remained in possession until the fall of 1872, and paid rent to a person professing to act as agent for the heirs of Yates & McIntyre.

If you are satisfied from the evidence that Moses Mincy paid rent to the agent of Magruder for the years 1866, 1867, and 1868, this would establish the relation of landlord and tenant. He entered under the license of his son Wesley, who was a tenant of Magruder, and although there was no contract between Moses Mincy and Magruder, yet if he paid rent during his possession to the duly-authorized agent

of Magruder this would create a tenancy from year to year. If a person enter lands as a tenant of another, or after entry has become tenant by the payment of rent, he is estopped from asserting any title in another until he has restored possession to his landlord. The possession of the tenant is the possession of the landlord, and so long as the possession subsists so long does the relation of landlord and tenant exist. This doctrine of estoppel has been applied very beneficially to the relation of landlord and tenant, and is intended to insure honesty and protect the landlord against the faithlessness of the tenant. The refusal of the agent of Magruder to receive rent in 1869 did not destroy the tenancy. It could only be terminated by the surrender of the possession to the landlord or his authorized agent. The surrender must be real and not colorable. The mere departure of the tenant one day, with the intention of returning and going back the same day, was by no means sufficient. This doctrine of estoppel between landlord and tenant does not apply to the latter when he has been evicted, and subsequently let into possession by a new and distinct title under another landlord.

It was insisted by the counsel for plaintiffs that if a tenant is threatened with eviction by a suit by a person claiming a paramount title the tenant may attorn to such claimant. The case in 9 Wallace, (*Merryman v. Bourne*, 9 Wall. 592,) to which the counsel referred, seems to sustain such a position, but there is no evidence to raise the question.

It is very material to ascertain whose tenant Mincy was during 1870-71-72. He did not pay rent to Magruder, but paid rent to a person claiming to be an agent of the heirs at law of Yates & McIntyre. The declarations of a person in possession of lands are ordinarily admissible in evidence to establish the relation of landlord and tenant; but if you are satisfied that Moses Mincy was the tenant of Magruder previous to 1870, he could not put an end to such tenancy by declaring that he held under another. He must have completely surrendered the premises to his former landlord before he could attorn to another claimant. If Moses Mincy was the tenant of Magruder previous to 1870, the tenancy continued until the fall of 1872, when Moses went out and Wesley went into possession as the tenant of Magruder. If you are satisfied that Magruder was in possession of the lands in controversy, through his tenants, from January 1, 1870, until the commencement of the suit in September, 1877, then he has acquired a title under the statute of limitations and he is entitled to your ver-

dicts, unless some of the plaintiffs were during such time under the disabilities of infancy or coverture, as the statute did not run against such claimants.

The evidence tending to show that the plaintiffs are the heirs at law of Henry Yates and Archibald McIntyre, and their condition as to coverture and infancy, is not controverted, but is somewhat complicated, and the counsel on both sides have agreed that the court may pass upon and determine these questions, and the finding of the court shall be your verdict on the fifth issue.

The sixth issue involves the amount of damages which should be assessed if the plaintiffs are entitled to recover the land. The counsel have agreed that you shall assess the damages for one year, and the court shall determine the number of years for which the plaintiff shall recover. You have heard the evidence as to the condition of the lands when the defendants went into possession, and the improvements which were made increasing the rental value more than fourfold. You should make a fair allowance out of the rents and profits for the permanent improvements made by the defendants, taking into consideration all the circumstances. I cannot lay down any certain and positive rule as to the measure of damages in this case. Most of you are farmers, and I feel sure that from the evidence you can come to a fair and just conclusion, aided by your knowledge and experience in such matters.

For four days you have patiently listened to the evidence and the elaborate comments of counsel, and I have heard and considered the learned legal arguments and the authorities cited, and I have endeavored to state the principles of law involved, and I hope you may now be able to find a just verdict determining the rights of the parties.

UNITED STATES *v.* ROBERTS and others.**(Circuit Court, S. D. Ohio, W. D. February, 1882.)*

1. OFFICERS—ACCOUNTS WITH GOVERNMENT—TELEGRAPH MESSAGES—EXCESSIVE CHARGES.

Where an officer paid for official telegraph messages more than the rate agreed upon between the government and the company, *held*, that if the officer had no notice of the price agreed upon between the government and the telegraph company for such messages, and if he paid the price demanded by the company, in good faith, he was entitled to credit therefor in his account.

2. SAME—SAME—INDIAN INTERPRETERS' SALARIES—CHANGE IN LAW.

An Indian agent, upon assuming his office, was instructed to pay interpreters a yearly salary of \$500. Subsequently, without his knowledge, the law was changed and their salaries fixed at \$400. The agent continued to pay \$500. *Held*, that he was entitled to credit therefor in his accounts.

3. SALARY OF OFFICER—WHEN IT COMMENCES—INDIAN AGENT.

An Indian agent was commissioned on September 28, 1872; he gave bond, took the oath of office, and was in readiness for duty October 15th. November 4th he received orders and started for his destination. He arrived at his post and reported for duty January 11, 1873, and on January 20th he took charge of the agency. *Held*, that he was entitled to his salary from the time he actually went to work for the government.

This was an action on the official bond of James E. Roberts, as Indian agent, upon vouchers disallowed by the accounting officers in the settlement of his accounts. Amount claimed, \$693.38. The defence was that all money received by him had been lawfully expended, and that the vouchers were improperly disallowed.

The following questions arose during the progress of the case:

(1) It appeared from the evidence that Roberts had sent a number of official telegrams over a line having a contract with the government establishing a certain rate at which official messages should be paid; that he was charged, and in good faith paid, more than the contract price, and had no knowledge of the rate fixed between the government and the company, and no means of knowing whether the price he paid was reasonable or unreasonable.

(2) It also appeared from the evidence that when Roberts took charge of the agency he received written instructions to pay interpreters' salaries at the rate of \$500 a year, and that he did pay them at this rate during his term of office; that he did not know that the law had been changed and a new statute passed during his term of office, fixing the salaries of interpreters at his agency at the rate of \$400 a year, and that he had received no instructions from the department notifying him of such change.

(3) It also appeared from the evidence that James E. Roberts was commissioned on September 28, 1872; that on October 15th he gave bond and took

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

the oath of office, and was under orders to hold himself in readiness to start for his post at a moment's notice; that on November 4th he received orders to report for duty, and started the same day, arriving at his destination and reporting for duty on January 11, 1873, and went to work at putting the affairs of the agency in shape to be turned over to him, until January 20, 1873, when he received for the property to his predecessor and took charge of the agency.

The government fixed the date at which his salary should begin to run at January 20th, the day he relieved his predecessor, and disallowed Roberts' claim in his account for salary from September 28, 1873, the date of commission.

Channing Richards, U. S. Atty., for plaintiff.

L. H. Pummill, contra.

SWING, D. J., charged the jury—1. That if they found that Roberts had no notice of the price agreed upon between the government and the telegraph company for such messages, and that he paid the price demanded by the company, in good faith, he was entitled to credit therefor in his account.

2. That if they found he paid the interpreters in good faith, under instructions previously given, at the rate of \$500 a year, and without knowledge of the change in the law fixing their compensation at \$400 a year, he was entitled to credit therefor in his account.

3. That the defendant was entitled to his salary from the time they found he actually went to work for the government.

Verdict for plaintiff for \$53.17.

KERSHAW v. TOWN OF HANCOCK.

(Circuit Court, N. D. New York. November 4, 1880.)

1. STATUTE OF LIMITATIONS.

Coupons detached from bonds are substantially copies of and partake of the nature of the bonds from which they are detached, and the statute of limitations which applies to them is the one which relates to sealed instruments. Hence they are not barred by lapse of time short of 20 years.

E. B. Thomas, for plaintiff.

Wm. Gleason, for defendant.

WALLACE, D. J. The defendant has pleaded the six years' statute of limitations, and insists upon it as a defence to the coupons upon which the action is brought. These coupons were originally attached to bonds; but, after being detached, were sold to the plaintiff, and

more than six years elapsed after their maturity before the action was brought. By the Code of Civil Procedure of this state actions upon "a contract, obligation, or liability, express or implied, except a judgment or sealed instrument," must be brought within six years after the cause of action has accrued; but actions upon sealed instruments may be brought within twenty years. The question is, which of these limitations applies to the coupons?

As a coupon has all the attributes of negotiable paper and may be recovered on by a *bona fide* holder, although the bond itself may have been paid or cancelled, it would seem anomalous, upon first impression, to hold that it is to be deemed a specialty for the purposes of the statute of limitations. But the question is not an open one in this court, in the absence of any decisions of the state court in construction of the statute of limitations, and in view of the decisions of the supreme court of the United States. The cases of *City v. Lamson*, 9 Wall. 477; *City of Lexington v. Butler*, 14 Wall. 282; *Clark v. Iowa City*, 20 Wall. 583; and *Amy v. Dubuque*, 98 U. S. 470, are decisive to the effect that the statute of limitations which applies is the one which relates to sealed instruments. These cases hold that coupons are substantially copies of the bond, in respect to the interest, and are given to the holder of the bond for the purpose of enabling him to collect the interest, at the time and place mentioned, without the trouble of presenting the bond every time the interest becomes due, and to enable him to realize the interest by negotiating the coupons in business transactions; and that the coupons partake of the nature of the bonds, which are of higher security than the coupons, and are not barred by lapse of time short of 20 years.

Judgment is ordered for the plaintiff.

MARION COUNTY v. McINTYRE.

*(Circuit Court, D. Nebraska. May, 1880.)***4 COUNTIES MAY SUE AND BE SUED.**

A county is a political subdivision of a state, and can sue and be sued.

On Motion in Arrest of Judgment.

DUNDY, D. J. In the month of October, 1876, the treasury of Marion county was robbed of about \$10,000 in money, and the thieves were, for a time, successful in secreting, as they had been in securing, the money. For the purpose of securing the arrest and conviction of the robbers the county offered a respectable reward for their apprehension. Two enterprising individuals of the state of Iowa, by name, Charles B. Thompson and James E. Hetherington, after gaining such information as seemed to be within reach, started in pursuit of the thieves and their plunder. The alleged thieves were successfully followed into the interior of this state, where they were "shadowed" by their pursuers, and where they were finally arrested by Thompson and Hetherington, who had been employed for the purpose. A portion of the stolen funds was recovered, the same having been found in the possession and on the person of one of the thieves. One of the original packages stolen contained the sum of \$2,000, and was taken from the thief by his captors before the package had been broken or opened. This package was retained by Thompson and Hetherington for a time, and until it was by them delivered to this defendant. But, while this business was progressing, the thieves, their accomplices or friends, incredible as it may seem, actually had Thompson and Hetherington arrested for robbery, the charge being for taking the stolen funds from the thieves, who had the same in possession. And, what is absolutely amazing, the magistrate before whom Thompson and Hetherington were taken required them to give bail to answer in the district court to the charge of robbery. The bail required was fourteen or fifteen hundred dollars, and without the use of the money captured the accused were unable to give it. At this stage of the proceedings this defendant first appears in this serious, and what seemed to be a rather dangerous and inconvenient, farce. This, however, let it be said, was not at all discreditable to him. Negotiations between this defendant and Thompson and Hetherington led to an agreement which

resulted in McIntyre executing a bond for the appearance of Thompson and Hetherington at the then next term of the district court, there to answer to the said charge of robbery. The \$2,000 package of money taken from the thieves was placed in the hands of this defendant, to be held by him as security against any loss he might sustain in consequence of his becoming surety for Thompson and Hetherington. This unbroken \$2,000 package, however, was required by the proper authorities in Iowa to use in prosecuting the thieves; and it was understood and agreed between the parties, at the time, that McIntyre was to surrender to the county the said unbroken package as soon as the county should place in his hands the sum of \$1,500, which was to indemnify him against loss if Thompson and Hetherington failed to appear in court and answer to the said charge of robbery. The county, subsequently, placed in the hands of the defendant the \$1,500, and the defendant surrendered the \$2,000 package, according to agreement. Subsequently, the said Thompson and Hetherington appeared in the district court, as they were required to do by their bond, and the grand jury of the county ignored the charge—the district attorney of the district, to his honor be it said, declining to prosecute in such a contemptible case. This put an end to the bond which the defendant had signed, and his obligations thereon were fully discharged. The defendant then had no further risk to run. His further connection with the criminal charge of robbery and the execution of the bond for the appearance of the accused was absolutely at an end. He could have surrendered the money to the plaintiff without danger of further liability, except as hereinafter stated. After all this, and after the defendant had notice of the ignoring of the charge of robbery against Thompson and Hetherington, the plaintiff demanded of the defendant the surrender of the money placed in his hands for the purpose aforesaid. Before this demand was made, however, it seems that several parties in this state had commenced suit against Marion county for alleged damages done to horses while in pursuit of the thieves and robbers who had plundered its treasury. Judgments were in *some* way entered in several of these peculiar cases, and the money was attached in the hands of this defendant to satisfy such claims. The plaintiff gave the defendant credit for the sums so attached, and requested payment of the balance, which was refused, and this suit was brought to compel payment of the balance due. The defence was:

First, that the plaintiff had not the legal capacity to commence and maintain the suit; *second*, that the money placed in the hands of the defendant, to-wit, the \$1,500, did not belong to the plaintiff; and, *third*, even if it did belong to the plaintiff, there was no authority for placing it in the hands of the defendant for any such purpose, and, *therefore*, no recovery could be had.

Trial was had on the issues found, which resulted in a verdict for the plaintiff of \$1,537.10.

The defendant seeks to have the judgment of the court arrested, for the same reasons relied on as matters of defence.

Marion county is one of the political subdivisions of the state of Iowa. The county was duly created by an act of the legislature of the state of Iowa, and has been organized and transacting the business pertaining to its organization for many years past. Under the laws of the state in which it is located it can sue and be sued, and do many other things, as well as individuals. This is necessary for the well-being, if not for the very existence, of the municipal corporation. And the several counties in Iowa, and in fact most if not all counties in other states, possess the same rights. It is believed that authority is conferred on all of them to acquire and hold property for the convenient transaction of their lawful business. We know that it is necessary for all of them to levy and collect taxes to furnish funds to carry on the financial affairs of the counties. All are invested with this authority. None can exist without it, and none have existed without in some way raising a revenue to meet the necessary expenses incident to the organization. This principle is universally recognized and applied. And, because of this necessity, counties have conferred on them the right to sue and be sued, so that their money and other property can be fully protected. Without such a right to protect the public property, without the right to resort to the courts to correct an abuse or redress a wrong or maintain a right, the power and right to acquire and hold property, however useful or necessary, would be but an empty shadow. Were it otherwise, a county would be at the mercy of every scoundrel who would spoliage its treasury or embezzle its property, and get across the lines of a state before being apprehended. Can it be said that a thief who steals the money or property of one of the counties in Iowa, Missouri, or Kansas, or any other state, shall find a safe place to enjoy his stolen property if he can succeed in crossing the Missouri river with it and finding a place in this state where he is out of reach of process, and where the same could not be recovered back, for the alleged reason that a county can-

not maintain a suit? I have seen no authorities that go to that extent, and I shall not be the first to announce such a doctrine. I will do nothing that would have such a direct tendency to convert this state into a place of sanctuary for thieves, robbers, and embezzlers of public property. Of course, it is not intended to apply this language to the defendant, but it shows the direct tendency and the inevitable result, if the principle contended for by the defendant's counsel should be reduced to practice. Few, if any, cases of this sort can be found. In fact, the necessity for them can but seldom arise in a law-abiding community. And, had there been a healthy public sentiment in the neighborhood where the parties who robbed the treasury of the plaintiff were arrested, there would have been no occasion for bringing this suit.

But the defendant insists that no recovery can be had here, for the alleged reason that the plaintiff had no right to place money in his hands for any such a purpose; that no such a payment could be made by the plaintiff and a liability be created thereby. We must bear in mind that the money belonging to the plaintiff was stolen; that it had passed beyond the reach and control of the plaintiff and its officers, without the consent or fault of either, and had found its way into the hands of other parties, where nothing but legal process could reach it. The \$2,000 package had been placed in the hands of the defendant, without the knowledge and consent of the officers of Marion county, who had the lawful right to control it. That package was undeniably the property of the plaintiff. The possession thereof by the plaintiff or its officers seemed indispensable in the prosecution of the robbers. McIntyre had the package of money. He was out of reach of process issued by the Iowa courts. He was not willing to surrender the money until the plaintiff would deposit with him \$1,500, in lieu thereof, to indemnify him against loss which might arise from his going on the bond of Thompson and Hetherington. This was done by the plaintiff, and afterwards the defendant was fully discharged from his liability on the bond. After that he paid out a part of the money on suits against the county, or its agents, and the defendant received credit therefor. He received the money from the county, or its representatives, to indemnify him against loss. He lost nothing, and as the money was placed in his hands to hold simply until he should be discharged on the appearance bond, it cannot, in any sense, be regarded as a payment out of the public money of the plaintiff, as claimed by the defendant. When he was released from liability on the bond he ought to have paid back

the money. He did not do so. And, finally, when appealed to by the representatives of the county, he positively refused to do so, for reasons stated in the answer. This is not as it should be. It is positively wrong. And when there is a wrong there is usually a corresponding remedy. When there is a remedy, a court will not long hesitate about its application.

I have found no reported case, nor have I read or seen anything in the laws of man, nor have I read or seen or heard of anything in the laws of God, that will prevent a recovery in a case like this. Reason, justice, equity, *law*, common sense, and fair dealing, all unite in demanding a restoration of this money to the plaintiff, of which it was at first wickedly and feloniously deprived, and from which it has been long improperly and unlawfully withheld.

I conclude that justice has been already too long delayed, and that it must be no longer impeded or interrupted. The motion in arrest of judgment, therefore, must be overruled. Judgment for the plaintiff on the verdict, for \$1,537.10.

UNITED STATES v. SCHINDLER.

(Circuit Court, S. D. New York. June 11, 1880.)

1. **CRIMES—RETAINING PENSION MONEY—WHO LIABLE.**

To be liable under section 5485 of the Revised Statutes for the crime of wrongfully withholding from a pensioner the whole or any part of the pension allowed, it is not necessary that the defendant is the regular attorney for the pension claimant, recognized as such at the pension office. If he be an agent or attorney, or any other person, it is sufficient.

2. **COMMISSIONER OF PENSIONS—FINDING CONCLUSIVE.**

Where the commissioner of pensions had passed upon the claim, and found claimant to be entitled to the pension, and had directed it to be paid, such finding is conclusive as to the rights of the claimant.

3. **EVIDENCE—STATEMENTS OF WITNESS—CREDIBILITY.**

Statement of a witness, made before trial, of facts which, if true, would tend to show bias on his part in favor of the defendant, are properly admissible in evidence as to his credibility.

4. **TESTIMONY OF PARTY TO RECORD—PRACTICE.**

To exclude a party to the record as a witness for the defendant, not only must objection be made for incompetency, but such objection must be sustained by the court at the trial.

5. **WEIGHT OF EVIDENCE—PROVINCE OF JURY.**

The jury, in weighing the testimony of the defendant when he stood contradicted by two witnesses, may consider the circumstance of the omission to call as a witness one who, as the evidence showed, was fully able to confirm his testimony, if it was true, without assigning any reason for such omission.

Wm. P. Fiero, Asst. Dist. Atty., for the United States.

Stephen W. Fullerton, for defendant.

Before BLATCHFORD, BENEDICT, and CHOAIE, JJ.

BENEDICT, D. J. The defendant was indicted under section 5485 of the Revised Statutes of the United States, by which statute it is made an offence for any agent or attorney, or any other person, instrumental in prosecuting any claim for a pension, to wrongfully withhold from a pensioner the whole or any part of the pension allowed and due such pensioner. Having been found guilty, he now moves for a new trial and an arrest of judgment, upon various grounds, which will be considered in the order of their presentation by the defendant.

It is first contended that the court erred at the trial in charging the jury that, upon the evidence, they would be justified in finding that the defendant was instrumental in the prosecution of the claim of Mrs. Rachel Helfrich to a pension, and also in declining to charge the jury that, if they believed the testimony of the defendant, they must find that the defendant was not instrumental in the prosecution of Mrs. Helfrich's claim. In this, we think, there was no error. The statute, plainly, is not intended to be confined to the regular attorney for the pension claimant, recognized as such at the pension office; for the language is, "any agent or attorney, or any other person." The testimony of the defendant, in regard to his connection with the claim of Mrs. Helfrich, sufficiently showed that he was instrumental in the prosecution of the claim, within the meaning of the statute.

The next point taken is that error was committed at the trial in refusing to permit the defendant to show that Mrs. Helfrich, who had claimed the pension as the widowed mother of John Helfrich, was married to one Henry Peters some 16 years ago. Here, the argument is that the statute under which the defendant was indicted applies only to the withholding of a pension "allowed and due," and that no pension was due to Mrs. Helfrich if the fact be that she had married Henry Peters. But the evidence showed that the commissioner of pensions had passed upon Mrs. Helfrich's claim, had found her to be entitled to the pension, and had directed it to be paid to her by the name of Rachel Helfrich. This was conclusive of her right to the pension. The claim had been duly passed on by the officer authorized by law to determine the question of her right, and his finding was conclusive, as against the defendant, that the pension had been allowed and was due, within the meaning of the statute under

which the defendant was indicted. To hold otherwise would permit an agent to obtain the allowance of a pension upon the ground that it was due, and, when indicted for withholding the money from the pensioner, escape punishment upon the ground that it was not due.

The next question is raised by the objection of the defendant to the testimony of Mary Bryan, that John Wyman, a witness called by the defendant, had said in the presence of Mrs. Helfrich, and after asking if she intended to proceed in this case: "I do wish you would persuade her not to, because it will jug her just as well as it will us." This objection is pressed upon the ground that Wyman, upon inquiry by the prosecution, had denied making such a statement to Mary Bryan, and therefore it was error to permit his statement of a collateral fact to be contradicted. But the fact that Wyman, one of the defendant's witnesses, had requested Mrs. Bryan to persuade her mother not to proceed with her charge against the defendant, and the fact that such request was made in the presence of Mrs. Helfrich, accompanied by the statement that "it will jug her just as well as the rest of us," were not collateral facts. If true, they tended to show bias on the part of the witness, and a desire on his part to save the defendant from prosecution. They would have been admissible if no inquiry had first been made of Wyman in regard to them, and inquiry of and denial by him did not make them any less admissible. These facts, therefore, whether denied by Wyman or not, were properly admitted in evidence, for they went to the credibility of Wyman, the defendant's witness. The jury were charged that these facts were material in that aspect alone.

The only remaining point made relates to the charge of the court in respect to the defendant's failure to produce one Wendalin Smith as a witness. In order to a correct understanding of the question now to be considered, the circumstances under which it arose must be stated.

At the trial the decisive question was, whether at a certain time and place the pensioner, Mrs. Helfrich, received the whole of her pension money, or only the sum of \$500.

The defendant, Schindler, testified that the pension check for \$1,375, sent by the pension agent in a letter addressed to Mrs. Helfrich, was by him taken from the letter in the presence of one Wendalin Smith; that subsequently Mrs. Helfrich, at her house, indorsed the check in the presence of himself and Wendalin Smith; that he and Wendalin Smith then went together to Monticello to get the check cashed; that part of the money obtained on the check was carried by himself and

part by Wendalin Smith; that on the next day, at the house of Mrs. Helfrich, the whole was paid to her,—Wendalin Smith, as well as himself, being then present, and also Henry Peters.

Mrs. Helfrich swore that she never indorsed and never saw the pension check, and that when the money was paid to her she was told by Schindler that the amount of the pension allowed was \$500, which sum and no more was paid to her.

Peters was called by the prosecution, and he confirmed Mrs. Helfrich's statement. The testimony of Wendalin Smith became, therefore, of the utmost importance to Schindler, if his statement was true. Schindler called Smith's wife as a witness, but omitted to call Smith, and without assigning any reason for the omission. The district attorney, in summing up to the jury, called attention to the fact that the defendant had omitted to call Wendalin Smith, and the court, in charging the jury, said:

"One man was there who is absent from the trial, and that is Wendalin Smith; and it is my duty to call your attention to that feature in the case. The failure to call Smith as a witness is an important feature in the case. It is for you to say whether the failure to call him is consistent with the statement of the accused, in view of the evidence in regard to Smith's connection with the affair; his presence with the accused at the house of Mrs. Helfrich on former occasions; his presence when the letter containing the check was opened; his going to Monticello; his custody of the silver; and the other circumstances narrated by the witnesses."

At the close of the charge, the defendant's counsel excepted to the foregoing part of the charge, and requested the judge to charge that no inference is to be drawn against the defendant because of the non-production of said Smith as a witness; which request was refused and the defendant duly excepted to such refusal. The validity of these two exceptions is now to be considered.

It is said that error was committed in charging as above quoted, and in refusing to charge as above requested, because Wendalin Smith was not a competent witness for the defendant, for the reason that he was jointly indicted with the defendant for the alleged offence. This argument wrongly assumes that the fact disclosed by the indictment, namely, that Smith was a party to the record, rendered it impossible for the defendant to present Smith's testimony to the jury. Manifestly, no such assumption can be permitted. It cannot be held to be a legal impossibility to swear a party to the record as a witness for the defendant. To exclude a party to the records from being a witness, it is necessary that objection be made. In the absence of

objection a party may always be sworn. In this case, for all that appears, no objection would have been made to swearing Smith. Indeed, the district attorney waived this objection when he pressed upon the jury that the defendant had not asked to have Smith sworn. Still further, to render it impossible for the defendant to present Smith's testimony to the jury, not only must objection have been made, but the objection must have been sustained by the court at the trial. There was no such ruling at the trial. Smith was not offered as a witness. Necessarily, the objection that he was a party to the record was not made; consequently, there could have been no ruling that he was incompetent, nor can the presumption be now made that Smith would have been held to be incompetent if he had been offered, and in this way foundation be laid for the proposition that it was impossible for the defendant to present Smith's testimony to the jury.

So far as is known, no adjudged case has declared that, on the trial of an indictment in a federal court, held within the state of New York, a party to the record, who is not a party to the trial, is an incompetent witness; and it cannot now be surmised that if the objection had been taken to Smith upon this ground, at the trial, he would have been excluded, and such surmise be made the foundation for an application for a new trial. Moreover, the minutes show that upon the trial the competency of Smith as a witness for the defendant was assumed by the prosecution and the court, and also by the counsel for the defendant. For, in the summing up, the district attorney pressed upon the jury the fact that the defendant had not called Smith, and, in charging the jury, the court used the language quoted, without eliciting a suggestion in behalf of the defendant that Smith was incompetent. Furthermore, it was strongly implied, in that portion of the charge already quoted, that Smith was competent as a witness for the defendant. If it was intended in behalf of the defendant to make a point based upon the incompetency of Smith, this implication in the charge should have been made the subject of an objection to the charge taken at the time, and in such a form as to call the court's attention to the implication, and that it was complained of by the defendant. The general objection wholly failed to do this, and, doubtless, because the incompetency of Smith was not then thought of. Any other supposition would impute to the counsel for the defendant an intention to conceal from the court the point of his objection and the reason of his request. But the implication in the charge that Smith was competent as a witness for the defendant was a ruling in favor of the defendant, and certainly, in the absence

of an objection made upon that ground, it is not now open to the defendant to contend that the circumstance that Smith was a party to the record rendered it impossible for the defendant to present Smith's testimony to the jury. The defendant's present position, in asking for a new trial upon the ground that the incompetency of Smith entitled him to have the jury charged as requested, is, in legal effect, the same as if, at the trial, he had offered Smith as a witness, and the court having, upon his request, ruled Smith to be competent, he was seeking a new trial because that ruling was wrong. Such a position is wholly untenable. As the case stood at the trial, it is plain to see that Smith would have been sworn if the defendant had offered to swear him, and therefore the question whether it be error to permit a jury to draw an inference unfavorable to the defendant, from his omission to call as a witness a person who could not be sworn in his behalf, which is the question that has been pressed upon this application, was not raised by the objection to the charge, or by the request to charge, and could not have been then raised. The only question which then arose was whether the jury, in weighing the testimony of the defendant, when he stood contradicted by two witnesses, had the right to consider the circumstance that he had omitted to call as a witness one who, as the evidence showed, was fully able to confirm his testimony if it was true, and whose interest was identical with that of the defendant, without assigning any reason for the omission; it being incumbent on the defendant, in view of the evidence as to Smith to show that he was not accessible. As to the correctness of the ruling upon that question there appears no room for a reasonable doubt. The jury were not instructed that they were bound to draw an inference unfavorable to the defendant from the omission to call Smith, nor was the weight to be given to this circumstance made the subject of a suggestion to the jury. The fact of the omission was simply called to their attention, and it was left to the jury to attach to it such weight as they might deem it entitled to, under the circumstances. In this there was no error.

The motion is denied.

See *U. S. v. Connally*, 1 FED. REP. 779.

EHRET v. PIERCE.

(Circuit Court, E. D. New York. July 28, 1880.)

1. COPYRIGHT.

An advertising card devised for the purpose of displaying paints of various colors, consisting of a sheet of paper having attached thereto square bits of paper painted in various colors, each square having a different color, with some lithographic work surrounding the squares advertising the sale of the colors, is not the subject of a copyright.

2. METHOD.

The exclusive right to employ a particular method of advertising wares cannot be acquired under the copyright laws.

In Equity.

Erastus New, for plaintiff.

Alfred B. Cruikshank, for defendant.

BENEDICT, D. J. This is a suit in equity, brought to restrain the defendant from publishing a certain form of advertising cards devised for the purpose of displaying paints of various colors, upon the ground that it infringes upon a copyright obtained in 1855 by one Thomas D. Morris, and thereafter assigned to the plaintiff.

The subject of the copyright upon which the plaintiff's right of action depends is designated, "A specimen pattern of Morris' tinted zinc paints. Card of outside colors." Such is the title recorded. It consists of a sheet of paper, having attached thereto 30 square bits of paper, painted in various colors, each square having a different color, and each being numbered. Surrounding these squares is lithographic work, containing, above the squares, the words: "Specimen pattern of Morris' tinted zinc paints. Recommended to builders, architects, and painters for their strength, freshness of color, durability, and cheapness. Colors selected from this card by number will be warranted to correspond with the pattern. Prepared dry or ground in oil, and for sale by Thomas D. Morris, 18 School street, Boston. Card of outside colors." Below the squares are the words: "Morris' improved groundwork for all kinds of wood graining; also medium for oil and distemper graining, and decorative painting;" and on one side the words, "Also, Morris' unrivalled snow-white and No. 1 French zinc paints;" and on the other side the words, "Any color not on the card will be matched from sample and ground to order at short notice."

The first question that presents itself for determination is whether such a card as above described can be the subject of a copyright.

under the act of February 3, 1831, (4 U. S. St. at Large, 436.) The act of 1831 is confined, by its terms, to the following matters, viz., a book, map, chart, musical composition, print, cut, or engraving. The plaintiff in his bill designates the matter in question as an engraving or chart. Morris himself, who took out the copyright, calls it a chart. It is not possible to hold such an article to be a chart, within the meaning of the act of 1831. The word "chart," used in that statute, refers to a form of map. This card is no map. Neither is it a print, cut, engraving, or book, within the meaning of the statute. True, it has lithographic work upon it, and also words and sentences; but it has none of the characteristics of a work of art, or of a literary production. It is an advertisement, and nothing more. Aside from its function as an advertisement of the Morris paints, it has no value. In my opinion, it is neither chart, engraving, nor book, and could not be the subject of a copyright under the provisions of the act of 1831.

The case of *Grace v. Newman*, L. R. 19 Eq. 623, has been cited as authority in support of the proposition that such a card can be copyrighted. In that case the matter was a book, containing sketches of monumental designs, which was held by the court to have a value as a book of reference. Upon this ground it was distinguished from the matter involved in *Corbett v. Woodward*, L. R. 14 Eq. 407, where a simple catalogue of articles offered for sale was under consideration. The card under consideration here in character approaches closely to the matter held in *Corbett v. Woodward* not to be the subject of a copyright.

But supposing the plaintiff to have acquired a copyright in the Morris card, it would still be impossible for him to recover, for the reason that the defendant's card is no infringement upon such a right. What the copyright laws secure is the exclusive right to make and sell copies of the copyrighted matter. The defendant has issued a card to which are attached square bits of paper of various colors. The colors on these squares are different from the colors upon the Morris card. The words and sentences that appear on the plaintiff's card do not appear on the defendant's card. All the information conveyed by the defendant's card is that the accompanying colors can be purchased of the defendant. The card contains no allusion whatever to the Morris paints, and, in form and subject-matter, is wholly unlike the Morris card. One card is an advertisement of certain paints sold by one person. The other is an advertisement of certain other paints sold by another person. No person by reading or seeing the

one can acquire any of the information conveyed by the other. It is difficult, therefore, to see upon what ground it can be held that one is a copy of the other.

The real matter of the plaintiff's complaint is, not that the defendant has copied his card,—that would occasion him no loss, but the contrary, for it would be a gratuitous advertisement of his paints,—but that the defendant, in advertising his wares, has adopted the same method pursued by him in advertising his wares, and his claim amounts in substance to claiming the exclusive right to employ that method in advertising. Such a right cannot, in my opinion, be acquired under the copyright laws.

The bill must be dismissed, with costs.

STAR SALT CASTER Co. v. ALDEN.

(Circuit Court, D. Massachusetts. February 23, 1882.)

1. PATENTS—IMPROVEMENTS—SALT BOTTLE.

A patent for an improvement on a prior invention is infringed by an improvement on a later patent if it contains the distinguishing characteristic of the prior invention.

In Equity.

F. P. Fish, for complainants.

T. E. Barry, for defendant.

LOWELL, C. J. The plaintiffs own the Richardson patent, No. 71,643, for an improved salt bottle. The defendant makes a bottle under the later patent of White, No. 198,554. No evidence has been produced to impeach the validity of the Richardson patent as an improvement upon the salt bottles in use at its date. They were Crossman's and Beach's; and Richardson improved on the former, and the defendant on the latter. Both appear to be patentable improvements, but that of the defendant contains the distinguishing characteristic of Richardson's, which is a movement of the pulverizer up and down when the bottle is used in the ordinary way.

Decree for complainants.

THE SANDRINGHAM.

(District Court, E. D. Virginia. January 31, 1882.)

1. ADMIRALTY PRACTICE—CONFLICTING TESTIMONY.

Where the testimony of the libellant and the ship's officers conflicts, and one of the officers of the ship is not examined on the points in dispute, that circumstance goes to the discredit of the ship's officers.

2. SAME—TESTIMONY OF EXPERIENCED MARINERS, GRADE OF—WEATHER REPORTS OF SIGNAL SERVICE.

The testimony of experienced mariners, of approved credibility, as to the character of the weather, and the practical effect of the wind and ocean swell, or other such facts occurring at sea under their own observation, is a higher and more reliable grade of evidence than the weather reports of the signal service from observations taken on land, and will be preferred by the court in passing upon such facts.

3. SALVAGE—ELEMENTS OF AMOUNT AWARDED.

The amount awarded as salvage comprises two elements, viz., adequate remuneration given by way of compensation according to the circumstances of each case; and a bounty given to the salvor for the purpose of encouraging similar exertions in future cases. The relative amounts of each of these elements given depend on the special facts and merits of each case.

4. SAME—INGREDIENTS OF SERVICE.

In addition to the six main ingredients of which a salvage service is composed, as announced in the case of *The Blackwall*, 10 Wall. 1, the court will take into view, as an important consideration, the degree of success achieved, and the proportions of value lost and saved; and will award a higher proportion, even on large values, in cases where both ship and cargo are saved with substantially slight injury, than in cases where only the ship or only the cargo, or only portions of it, are saved.

5. SAME—AWARD OF—WHAT INCLUDED IN ESTIMATE OF VALUE.

A ship on a voyage from Galveston to Liverpool was wrecked at the Virginia capes. Both ship and cargo were saved by salvors, and enabled to complete the voyage. One-half the gross freight to be earned on arriving at Liverpool was included by the court in estimating the value of the property saved.

6. SAME—ONE-FOURTH COMBINED VALUE OF VESSEL AND CARGO AND HALF OF FREIGHT AWARDED.

A steamer worth, with her cargo and freight, \$200,000, was stranded on Cape Henry, within 100 yards of the shore, where the currents of the Chesapeake bay, encountering those of the ocean, are often very dangerous. Salvors, with a large force of vessels, wrecking apparatus, and men, after a week of hard and dangerous labor, in which the highest degree of skill was shown, succeeded in getting off both vessel and cargo so successfully as to allow them to proceed on their voyage after repairs to the ship. One-fourth of the combined value of the vessel and cargo, and of half the freight, was awarded as salvage.

In Admiralty.

Sharp & Hughes, for libellant.

Walke & Old, for respondents.

HUGHES, D. J. On the evening of Friday, November 5, 1880, the iron steam-ship, Sandringham, of Glasgow, 1,159 tons, McKay, master, at about 7 P. M. was beached some three-quarters of a mile south of Cape Henry light-house. She was loaded with 3,000 bales of compressed cotton, and a complement of flour and manganese. She had cleared at Galveston, and was bound for Liverpool. She had first struck on the outer reef or sand-bar which stretches along, and parallel with, and about 300 yards distant from, the shore; but, passing over that, she then struck the main shore at a point some 50 or 75 yards out from low-water mark, where she stranded in the sand and was unable to get off. There was at the time a heavy fog, but the light at Cape Henry could be seen, and had been seen at intervals previously to the stranding of the ship. Capt. McKay says that "the grounding was occasioned because of a heavy fog, a heavy swell of the ocean from the eastward, and because there was no pilot on board, and he himself was ignorant of the nature of the coast."

At 7 deg. 40 min. life-boats from the government's life-saving station at Cape Henry came along-side and the captain went on shore. The ship was then striking heavily at intervals against the ground, and continued to do so during the night and nearly all of next day. After coming ashore the captain telegraphed to Norfolk for assistance. The ship was taking water all night, and the pumps were kept going and the hold-sluice left open. Some time after midnight on Saturday morning, the 6th, the ship was still striking heavily upon the ground, making water, and lying on her starboard bilge. A heavy swell was running in and breaking over her forepart. At 4 A. M. she lay quiet, but her pumps were kept constantly going. At 7 A. M. she began to strike and strain heavily aft. At noon the captain returned from the shore in a life-boat. At 2 P. M. he received a telegram from the life-saving station announcing that a storm was threatened, and advising him to land his crew and their personal effects. After 4 P. M. the crew were, in the course of time, all landed; the chronometer also was sent ashore; but the master, first mate, and engineer remained aboard a while longer. At 6 P. M., or about that time, the wrecking officer and wrecking gang of the libellant came on board and took charge of the ship. After the ship's crew had gone ashore the captain asked the wrecking officer on board (Capt. Nelson) whether the wrecking surf-boats were sufficient to save himself and officers as well as the wrecking gang, and was answered in the negative; the

reason assigned being that the surf-boats were only of size sufficient for the wrecking men. The ship's engineer, Watson, who had banked his fires and locked his engine-room, also inquired of Capt. Nelson whether, if anything happened from the storm during the night, he himself could be taken in the surf-boats, and received a like answer in the negative.* Thereupon Capt. McKay, Watson, and the first officer went ashore on the rocket apparatus of the life-saving station.

Capt. McKay testifies that he left his nautical instruments, books, charts, and the clothing of himself, the engineer and others on board.

Most of the foregoing facts are taken from the log-book of the *Sandringham*, and from the depositions of her officers given in this cause.

When the master first went ashore, on the night of the fifth of November, he telegraphed to the house of William Lamb & Co., at Norfolk, asking for assistance, and requesting the firm to make the best arrangements practicable for saving the vessel and cargo.

Except at Norfolk no assistance was available short of Baltimore or the Delaware, and the weather, fog, and distances were such that efficient aid with sufficiently powerful steam-tugs could not from these quarters have been procured by any possibility, within 24 hours. Indeed, it is not shown by the evidence that any adequately constituted, equipped, and furnished wrecking fleet existed at all south of New York, except that of the libellant.

I think it is absolutely shown that if the saving of this ship and cargo could only have been effected by a wrecking fleet of stout steamers, tugs, schooners, and surf-boats, completely manned and equipped, that of the libellant was the only fleet available at the time for this enterprise, or existing at all on the south Atlantic sea-board. Accordingly, the Messrs. Lamb & Co. at once engaged with the libellant for this salvage service. Capt. McKay says in his deposition:

"Having received a telegram from Lamb & Co. to the effect that the arrangement of salvage was left to arbitration, on meeting those captains (Capts. Nelson and Orrin Baker, of the wrecking fleet, at about 11 A. M. on the 6th) I mentioned that circumstance to them, and told them to commence operations at once on that understanding."

The testimony in the case proves that what the captain says about "arbitration" was not true. All the witnesses of the libellant who testified on the subject concur in stating that nothing was said about arbitration, and the claimant does not adduce a single witness to cor-

*Capt. Nelson testifies that his answer was that he could not take the baggage, but would take the officers.

roborate Capt. McKay's assertion. The simple fact was that a salvage service was undertaken, without any contract or definite understanding as to the compensation or the mode of ascertaining the amount of it.

The libellant, Capt. Joseph Baker, on being called upon by Col. William Lamb, the head of the firm of Lamb & Co., at once began preparations for the relief of the stranded ship; and the steam-tug Nettie, Capt. Cole, with large anchors and cable, with an outfit of other wrecking apparatus on board, set out from Norfolk for Cape Henry about midnight of the 5th. Owing to the heavy fog she did not pass Fortress Monroe (13 miles from Norfolk) till daylight of Saturday, the 6th. When abreast of the fortress she met the wrecking steamer B. & J. Baker, also belonging to the libellant, Capt. Orrin Baker, master, which was on her return from another wrecking enterprise, having on board a considerable outfit of wrecking material, including a very large anchor of 4,500 pounds weight. It had also on board a wrecking gang under Capt. Nelson. The Baker at once joined the Nettie, and both proceeded to the vicinity of the Sandringham, which lay about 17 miles from Fortress Monroe and 30 miles from Norfolk. Between the hours of 10 and 11 A. M. of Saturday, the 6th, they arrived near the steamship, and Capts. Nelson and Orrin Baker went aboard her. After making slight examination they went ashore, where they saw Capt. McKay, and were directed by him to go to work to save the ship; no terms being mentioned in the interview. They at once thereupon returned to the wrecking steamers, and proceeded to lay their two largest anchors some distance beyond the outer reef, planting one anchor out beyond the other, and connecting the two by a chain. To the inner anchor they attached their cable, and then laid the cable to the Sandringham. The distances were nearly as follows: From low-water mark on shore to the ship, between 50 and 75 yards; from the ship to the outer reef and line of breakers, about 150 yards; the breakers were about 100 to 150 yards wide; the two anchors were well out beyond the outer line of the breakers.

During the wrecking operations the wrecking steamer B. & J. Baker lay for the most of the time about 1,000 yards beyond the ship; other wrecking vessels 150 yards and more beyond the breakers. Having planted the anchors beyond the outer reef and breakers, Capt. Nelson, who had charge of the wrecking gang which was to operate on board the Sandringham, came along-side the ship in a surf-boat, with his cable, at about 4 P. M., and called to those on board for a line

with which to haul his cable on deck; but none was thrown him. He thereupon climbed on board and found the crew preparing to go ashore with their baggage. On being asked by the second mate if he intended to take charge, he answered yes, and asked for help to haul the cable up. The second mate replied that they had all stopped work and were going ashore.

By failing to receive the prompt assistance he counted on, Nelson's line got fouled with the propeller of the ship. This accident made it necessary to return outside for a grappling hook with which to fish up the cable, which he succeeded in doing, and in getting his cable aboard the ship by about 6 P. M. There was much wind and swell. The crew, as before stated, had then left the ship, and were followed shortly afterwards by the officers, who left their ship by the rocket line of the life-saving station for personal safety from a coming storm.

The log-book of the Sandringham, speaking of the sixth of November, says:

"After the wrecking crew came aboard, the ship driving up the beach all the time. Six P. M., set cables tight, (meaning the wreckers' anchor cables.) Master and myself went ashore on the rocket apparatus. Weather looking bad and storm signal flying on the life-boat station. A strong breeze from the south-east, with a heavy swell running in."

The Sandringham then lay at an angle of about 45 deg. with the beach, heading northerly, with her port side to land. She lay upon a beach of fine movable sand, which would be rapidly cut out from under the ship by the strong currents and heavy ocean swells which run more or less continually at Cape Henry. She now careened considerably on her starboard side, in consequence of the strong current from the eastward which had been running since she stranded.

She was a propeller, and an iron-compartment ship, with five compartments; and she had a ballast tank in her hold of 100 tons capacity, which was then filled with water. She had a visible leakage around her stern gland, and had taken in several feet of water aft, which the pumps, though kept active, did not effectively reduce. The testimony of the libellant is that there was as much as six or seven feet of water in the hold when the wrecking officers, Cpts. Nelson and Orrin Baker, first came to the ship about 11 A. M. on the 6th. Just previously to seeing her master on shore, they, in company with the first mate of the Sandringham, proceeded to ascertain the extent of the leakage below, and found that the water was from six to seven feet deep in the shaft-alley and engine-room, and all the

way from the bulk-head aft; with the rear compartment leaking near the stern post. The defence did not call the first mate to contradict this statement. There was no diminution of water between 11 A. M. and 6 P. M. on that day.

When the wreckers first took charge, at 6 P. M. of the 6th, the ship had sunk about seven feet in the sand, though some of the ship's crew insist in their testimony that the depth was not more than four feet. In either case, the sequel showed that it was wholly beyond the power of steam-tugs, in any number, and of any capacity, to draw the ship off the beach as she lay at the hour last named, and no expedient was left for saving her except to lighten her of part of her cargo, to pump out the ballast tank, to reduce the amount of water in her hold, and to gradually draw her out of the sand by heaving upon the cable attached to anchors planted out in the main, whenever the tide favored. With all their exertions they did not actually move the ship for five days. When the officers and crew of the Sandringham left their ship on the evening of the sixth of November, as has been stated, her master had himself despaired of being able, with the ship's crew and instrumentalities, to save her. Although he had cables, anchors, and boats for planting them, he did not attempt at any time on the 6th to save his ship by the means which the wreckers employed afterwards with success. He states that the weather and the ocean swells were too severe for this. Whether or not at the time of leaving the vessel on the rocket apparatus of the life-savers, on the evening of the 6th, the master and his officers had any expectation or intention of returning at all, does not conclusively appear. It is certain that the master on that night, seeking personal safety on land, abandoned the ship in the face of danger absolutely to the wreckers, and did not offer or attempt to resume authority over her until after she had been safely brought into harbor a week afterwards.

The ship, having survived the severe weather of the night of the 6th, and the weather and the sea having considerably abated by next day, Capt. McKay and his crew returned to the ship on the 7th, and resumed the occupancy of their respective quarters on board. But they gave no assistance in the wrecking operations at any stage of them, except that the engineer and firemen worked the ship's donkey-engine and winches in heaving upon the cable; and this, although the wrecking enterprise went on laboriously from the night of the 6th to the night of the 13th, when the ship was brought into harbor.

There is some contradiction in the evidence as to whether or not the bed on which the ship lay after she was beached was a *quicksand*. Admiral Smyth, in his Dictionary of Nautical Terms, defines this to be "a fine-grained, loose sand, into which a ship sinks by her own weight as soon as the water retreats from her bottom." It is immaterial what name we apply to the sand off Cape Henry. The fact is that there, and all along the coast southward for several hundred miles, the sand is a fine, movable substance, which, when a heavy body is resting upon it, retreats from under it by the action of the currents of the ocean which there constantly prevail, leaving a bed into which the body sinks deeper and deeper the longer it remains in the position. There is no possibility of any substance, which, in specific gravity is too heavy to float upon the surface of the water, being lifted out of its bed in this sand and floated upon the shore. All the vessels that are beached upon the sands of this long coast invariably continue to sink, deeper and deeper, until they disappear from sight under the sea into the sand.

The fate of the United States steam-ship Huron, wrecked off Kitty Hawk, November 27, 1876, was a notable historical exemplification of this characteristic of the sands of this part of the coast.

When the wreckers took charge of the ship at 6 P. M. on the evening of the 6th, and with their cable took hold of her aft, and began to heave upon the cable attached to the anchors planted outside the breakers, they checked the wallowing and sinking process; but the ship had been there nearly 24 hours on the beach, and had already sunk some seven feet into the sand. The wrecking company consisted of the libellant, who remained in Norfolk to forward promptly whatever might be needed at the wreck; Capt. Stoddard, who had the general direction of the wrecking operations, and who remained most of the time on the B. & J. Baker; Capt. Nelson, who had charge of the work on board the Sandringham; Capt. Orrin Baker, master of the wrecking steamer B. & J. Baker; Capt. Oakley, of the steam-tug Mollie Wentz; and 80 or more other persons, composing the crews of the several vessels employed, and embracing the wrecking hands, a gang of about 30 of whom operated on the ship. Besides the vessels already named, the tugs Spring Garden and G. W. Roper, the wrecking schooners Henrietta, Joseph Allen, and Annie Clark, three surf-boats, and the lighter Neptune, were engaged in the enterprise.

The plan of operations was to heave on the cable and take advantage of every tide to draw the ship off the sand-beach; to lighten her by taking off cotton, and shipping the bales on tugs and schooners to Norfolk; to keep down the leakage by active pumping; and to pump out the great weight of water in the ballast tank.

There were rough weather and strong ocean swells during four or five of the several days during which the work was going on, which made it necessary to pass the cotton from the deck over the port side of the ship, which was considerably *listed* upon her starboard side, to let it down into surf-boats run under her port side, and to carry it in these surf-boats across the breakers to the steamers and schooners outside. The weather and swell of the ocean were such during these days that these steamers and schooners could not come inside of the breakers without great danger. The work was the more tedious because it could not go on at night. Capt. Nelson says in his testimony:

"There was a line of breakers outside of where the ship was lying, from 100 to 150 yards wide, where it is dangerous to cross during the day; and therefore I wouldn't undertake to do such things at night. I was satisfied the [surf] boats would swamp if I did undertake it, and therefore I wouldn't run the risk of losing boats and men's lives. We couldn't work on the ship [at night] for the reason we couldn't see how to work in lowering cargo into the boats, and couldn't have lights in the hold of the ship loaded with cotton."

The weather was at times such that the vessels receiving cotton from the surf-boats found it necessary to put into Lynhaven bay at night. The surf-boats were pulled out across the breakers by their crews taking hold of a lead-line that was stretched from the ship to the vessel receiving the cotton outside. Occasionally they were rowed out when the weather would permit. The surf-boats were rowed back by their crews, and were towed, on one day by a tug, out to the windward from the receiving vessels, in order to give them a fair wind to return to the Sandringham by rowing. Owing to the danger attending the lifting of the bales over the port side of the ship and letting them down into the open boats tossed on the waves below, and the small number of bales that could be carried in each boat, the process of saving the cotton was slow and tedious; but there were saved in this manner on the seventh, eighth, ninth, and eleventh of November an aggregate of 573 bales.

It was fortunate for the ship that the wreckers succeeded in making fast their cable to her aft port before night on the 6th, the night

of the first storm which she encountered on the beach. By keeping a taut cable that night by means of the capstan and rope and pulleys, they probably saved her from sinking hopelessly into the sand. By continuing to heave upon the cable afterwards, they gradually, after a few days, brought her stern around until she had attained a position approximately at right angles with the shore, across the course of the currents that run along the beach. When their hawser was first made fast, the ship was lying within 75 yards of low-water mark, and 150 yards inside the outer reef, and of the line of breakers 100 to 150 yards wide beyond.

On Saturday, the 6th, and every day afterwards until Friday, the 12th, the sea was too rough for any of the wrecking steamers or schooners to come along-side of the Sandringham; either because of rough weather or of the ocean swells that prevailed. Up to the night of the tenth of November no success had attended the efforts of the wreckers to pull the ship from her position on the beach. On that night she encountered a second storm, a heavy wind and sea striking her from the south-east at 11 P. M. In consequence of the current then cutting the sand from under her port side, she took a considerable list towards the shore, and was in danger throughout the night of going over on her beam ends. The wreckers had to apply themselves with great energy and determination to the task of breaking up the cotton between decks, and moving it from the lower or port to the starboard side of the ship, in order to keep her from capsizing. By dint of hard work, continued through most of the night, they succeeded in sufficiently righting the ship to save her from the danger of capsizing. The weather had been more or less rough all day on the 10th, so that no cotton could be taken out of the ship even in surf-boats. On the 11th it had sufficiently moderated to admit of the resumption of operation with the surf-boats. On the 12th the sea was smooth enough for the wrecking schooners and steamers to come along-side the ship, so that on that day as many as 476 bales were put off, or nearly as many as had been saved in the whole period of five days preceding in surf-boats.

By the night of the 12th the whole quantity of cotton which had been removed amounted to 1,049 bales, which, the leakage having been stopped and the ballast tank having been emptied, so lightened the ship as to give strong hope of getting her afloat. The 1,049 bales of cotton which were removed from the ship were all taken either from the upper deck or from between-decks. It is not true, as the

second mate of the ship testified, that 1,000 bales were taken from the lower hold. It is true that something less than 50 bales were taken from the hold for the purpose of making room for a pump that was intended to be put in there by the wreckers; but some of these bales were put back, and only the rest sent off the ship. The cause of the *listing* of the ship on the night of the 10th, from the starboard to the port side, was not the removal of 1,000 bales of cotton from the hold to the deck, as the second mate testified, but was the change of the current, which then cut the sand from under the port bilge of the ship, instead of the starboard bilge, as it had previously done. The ship was first got out from her original position on the 11th, when she was moved about 30 feet. On the 12th she was moved 10 feet, and on the morning of the 13th, 50 feet.* It has already been stated that this was done by heaving on the cable with the ship's winches, worked by the ship's engines, engineer, and firemen, under the direction of Capt. Nelson. About 8 p. m. on the 13th the ship was finally got afloat, and was pulled out into deep water beyond the breakers by a tow from the steamer B. & J. Baker, aided by her own engines, which had been fired up. Her tow line was then cast off, and she steamed into Norfolk harbor under the command of Capt. Stoddard, arriving there about midnight.

It was fortunate that she was got afloat just when she was, for she thereby escaped by half an hour a heavy wind and swell from north-eastwardly that then set in; that particular swell lasting several days after the wind had sunk to four miles an hour.

In the saving of the Sandringham and her cargo there was no lack at any stage of the undertaking of men or vessels or material in any particular, and the enterprise was thoroughly successful; the ship having been brought safely into port so little injured that she soon afterwards steamed off to Baltimore for repairs, and not a bale of cotton having been lost.

So unusual and unexampled was the success of this enterprise that it naturally suggests the question whether the fortunate result was owing to the skill of the men in charge, or to the mildness of the weather, the moderation of the sea, and the absence of risk and danger in the wrecking operations.

*These figures are taken from the log-book, which is not evidence against the libellant. I suppose they are a slip of the pen, and that *yards* or *fathoms* were intended. Libellant's witnesses make the distances greater than if the log-book meant feet.

In regard to the first question, it may be safely stated that the wrecking officers who conducted this enterprise were men of extraordinary skill and experience in the business of wrecking; and that they were furnished on this occasion liberally and promptly with every appliance that was requisite for this work. The libellant is a wrecker by profession and of a life-time's experience. He had at command at the time of the salvage under consideration, as the creation of a heavy outlay of capital, estimated by some of the witnesses in this cause at as much as \$100,000, a complete outfit of wrecking vessels, implements, and material.

Per contra, it is shown by an inventory of the prices at which these various articles were valued to the Baker Wrecking Company, on a recent occasion, that the aggregate proceeds of sale of the larger part of them was only \$25,575. The libellant contends, however, that the lowness of these prices was owing to the absence of competition for such property, in consequence of the general discontinuance of the wrecking business that has taken place on the Atlantic seaboard, from which cause the prices were but nominal, and far below the original cost of the articles inventoried. He contends, also, that this sort of property is peculiarly liable to waste, deterioration, and loss; and always sells, at second hand, at great sacrifice. Be this as it may, the fact remains that the libellant's assortment and outfit of wrecking vessels, apparatus, implements, appliances, and supplies of all kinds was very large.

Capt. Baker had been long at the head of the principal wrecking company of the Atlantic sea-board; is reputed one of the most experienced and successful wreckers of his day; and his establishment was, at the time of this service, the only one south of New York that had survived the evil fortunes that have for a long period beset the wrecking business on this coast. The earnings of his firm in a period of 10 years had amounted to the aggregate sum of \$811,425; and his outlays during this period were \$700,000; to which must be added the loss and depreciation of stock in the wrecking business. Capt. Stoddard had been a partner, but was not so in November, 1880, and engaged in this special enterprise on a special agreement. His compensation was only \$10 a day; but the libellant was in debt to him, and he hoped to make his debt good.

By reputation Capt. Stoddard is probably the best wrecker on the southern Atlantic coast. He has followed the sea the greater part of his life, and has been engaged in the business of wrecking, as a pro-

fession, for many years. He has had more experience in the business than any man on this coast, except Capt. Baker, and is still in the vigor of manhood.

Capt. Nelson, Capt. Cole, and Capt. Orrin Baker are also wreckers of many years' practical experience, and of the highest repute in the profession. These are all men of high personal character, and good standing as members of society. They operate as wreckers along the whole Atlantic coast of the United States south of New York, and are sent for from far and near.

The crews of the wrecking vessels were employed by the year. This insured familiarity with their duties, but did not insure the extraordinary exertion which is inspired by the lively expectation of the extraordinary rewards of salvage services. It is quite probable, as is contended by the defence, that some of the working gang who were employed in this enterprise were of the class of common laborers, who were without special experience in the wrecking business, and were paid but ordinary wages. Yet, on the whole, the evidence in this case establishes the conviction that if success in a wrecking enterprise could be insured by large experience, approved skill, and perfect appointments, this particular enterprise had the benefit of all these conditions of assured success in a high degree.

On the question whether the weather and sea were such as to render the service of the wreckers in this enterprise one of risk, danger, and difficulty, there is some contradiction in the evidence in the case.

There was undoubtedly a storm on the night of the 6th which put the ship in great peril, and which would in all probability have caused her to bilge and break up, and possibly to have sunk in the sand hopelessly beyond recovery, but for the wreckers having planted their anchors and made fast their cable to her on the afternoon before. There was undoubtedly another storm on the night of the 10th, which, by the changed action of the current upon the sand-bed under her, nearly capsized the ship; and would have done so, but for the hard work performed by the wreckers on board in breaking up the cotton between-decks and shifting it from the lower to the upper side of the careened vessel. On both occasions the ship was in great danger and peril, and was rescued from them by the exertions of the wreckers. The surf-boating of the cotton was undoubtedly rendered necessary, during the intervals between the storms, by the rugged condition both of the weather and the sea.

Though denied by McKay, the engineer Watson, and second mate, it must have been true that there was no time between the

night of the 6th and the morning of the 12th in which the wrecking vessels could safely have come inside of the breakers, and lain alongside of the ship and taken cotton from her. The same condition of the weather and sea made the process of delivering the bales of cotton from the listed ship into the surf-boats, and conveying them many hundred yards across a wide line of breakers, a work of danger, both to life and to property, requiring for its avoidance much skill and care. It is difficult to read the whole evidence in this case and then to question these facts as to the two storms, and as to the work of the surf-boats.

Three of the witnesses for the ship discredit their own testimony by statements signally untrue, and I have no choice but to reject it when it is in conflict with the evidence of the wrecking officers; and their testimony is the more open to distrust from the fact that the first mate of the ship was not examined on the principal points in dispute.

Although the reports of the weather and sea-swells made at the signal office at Cape Henry do not show during the whole period of this service as bad a condition of weather and sea as was testified to by the wrecking officers, still it is probable that this partial conflict of testimony is more apparent than real. On that part of the coast the wind and sea-swells are not necessarily simultaneous. It is well known that often there are high winds without much swell, and, on the other hand, heavy swells in fine weather. That the reports from the signal station at Cape Henry, put in evidence by the defence, do not in some respects correspond with the testimony of mariners, speaking from their personal experience, is doubtless owing partly to the fact that the observations at the signal station are made only seven times in 24 hours, at a point on the coast where the changes of wind and current are frequent and sudden; partly to the fact that they are made by theoretical men on shore, whose position is essentially different from that of practical seamen actually encountering the elements out upon the waters; and partly to the fact that the nomenclature of the signal service, which is purely scientific and arbitrary, differs from that of seamen, which is conventional.

For instance, the men of the signal station say that the wind is not "high" until it blows at the rate of 35 miles an hour; is not a "gale" until it attains a velocity of 45 miles; and does not become a "storm" until it exceeds the rate of 50 miles an hour. Mariners, however, who buffet the winds, use a nomenclature which refers to sensible effects rather than to mathematical precision, and to veloci-

lies apparently as great but often much less than are indicated by scientific instruments. There is accordingly observable, in some of the testimony taken in this case, a discrepancy between scientific reports of winds and swells at Cape Henry, made from instrumental observations taken on shore, and the statements of seamen who were engaged in the vessels and surf-boats outside. And, as I am under the necessity of passing upon the relative value of this testimony, I am free to say that I am not inclined to repose entire confidence in the reports of the officers of the signal service as to facts out at sea, when they conflict with testimony of experienced and credible seamen. Indeed, these reports cannot be received between parties to a litigation as evidence in the strict legal sense. They lack the two sanctions necessary to the validity of legal testimony, viz., that of being given on oath, and that of being subjected to the opportunity of cross-examination.

The courts are doubtless at liberty to take judicial notice of these reports as historical minutes of the course of natural events; but they certainly are not bound, and perhaps not at liberty, to give full credence to them in prejudice to the interests of litigants, when contradicted by the testimony of practical mariners of unquestioned credibility. The depositions of experienced mariners as to events of which they have practical knowledge, given on oath and under cross-examination, is certainly a higher grade of evidence than such reports; and where the witnesses are well known and enjoy a character beyond impeachment, it must be preferred. No doubt the scientific reports are true, mathematically, as of the isolated points of time and place to which they refer; yet all naked mathematical facts occurring in the course of nature are more or less modified by circumstances which do not appear in the barren scientific minutes which record their occurrence. If a surf-boat crossing dangerous breakers in a high wind on a sea-swell is suddenly caught up and capsized, the property on board lost, and the men drowned, the collision of elements which actually did occur, and did produce the catastrophe, may not be denied to have occurred on the faith of a minute taken an hour or two before or afterwards, at the nearest signal station on shore, showing that the wind was the time not blowing a "gale," but only at the rate of 44 miles an hour, and that the swell was "light south-east."

A swell that is light along the shore may produce angry, roaring, engulfing breakers out on a reef but a few hundred yards off. If the witness to nautical facts be an intelligent person of experience and

approved credibility, a court of law must believe what he says under oath and under cross-examination, concerning facts which have occurred within his own knowledge, in preference to the isolated minutes of an officer who was not on oath and was not cross-examined as to any of the explanatory circumstances which may have existed at the time. Yet I am free to admit that these minutes often afford to a court invaluable assistance in correcting extravagances of statement on the part of ignorant or unscrupulous witnesses.

The values agreed upon for the property saved are:

For the ship, valued in Baltimore, - - - - -	\$ 36,000
For the cargo, - - - - -	150,000
For the freight from Galveston to Liverpool, - - - - -	14,000
	<hr/>
	\$200,000

After the ship was valued repairs were put upon her which cost \$13,677.59.

THE LEGAL FEATURES OF THE CASE.

To the case whose leading facts have thus been recited I am now to apply the principles of the law of salvage, and ascertain by their guidance the amount of money to be awarded for the successful service which has been described. Although it is true that this amount lies within the discretion of the judge, yet he is not at liberty to render an arbitrary judgment at his own individual discretion or caprice,—a *rusticum iudicium*,—but must be governed in his award by the teachings of precedents and the recognized principles of the law of salvage. That this is a case of salvage—that is to say, a case for *bounty* as well as *wages*—is conceded by the respondent, who admits that *one-tenth* of the value saved would not be an undue compensation. The libellant claims *half*, and my own duty is simply that of determining the amount of compensation to be awarded. Being a case of salvage, it is not one of mere wages, *pro opere et labore*, nor a case of *quantum meruit*, in the sense that the work is to be paid for in an amount ascertained by applying the ordinary rules of remuneration for personal services; but it is a salvage claim for services which could not have been compensated at all except in the event of success, and which not only embraces *wages* for the work and labor done, and *adequate remuneration* for outlays of time, labor, and means according to their actual value, but also embraces a *reward* for having rescued property from the peril of the sea, under circumstances of risk and danger to the salvor and his property, and in the face of the contingency of get-

ting nothing at all in the event of failure; a reward so liberal as not only to satisfy such reasonable expectation of extraordinary compensation as prompted this particular adventure, but also to serve as an inducement to like exertion by salvors in future cases of peril and doubtful success.

Chief Justice Marshall alluded instructively to the policy of the law of salvage in the case of *The Blaireau*, 2 Cranch, 266, in the following terms:

"If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life, by the salvor,—no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea; yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice. If we search for the motives producing this apparent prodigality in rewarding services rendered at sea, we shall find them in a liberal and enlarged policy. The allowance of a very ample compensation for these services, one very much exceeding the mere risk encountered and labor employed in effecting them, is intended as an inducement to render them, which it is for the public interests, and for the general interests of humanity, to hold forth to those who navigate the ocean."

In the case of *The Henry Eubank*, 1 Sumn. 400, Judge Story gave expression to similar views:

"The law does not stop short with a mere allowance to the owner of an adequate indemnity for the risk so taken. It has a more enlarged policy and a higher aim. It looks to the common safety and interest of the whole commercial world in cases of this nature; and it bestows upon the owner a liberal bounty to stimulate him to a just zeal in the common cause, and not to clog his voyages with narrow instructions which should interdict his master from salvage service. * * * The law offers not a premium of indemnity only, but an ample reward, measured by an enlightened liberality and forecast."

Of course this liberal policy of the courts thus announced must not be abused to the extent of encouraging or ministering to a spirit of avarice and greed. Another American jurist of the early part of our century, Judge Hopkinson, in the case of *The Elvira*, Gilpin, 60, says that to a just and fair remuneration for the labor, hazard, and expense which a salvor has encountered—

"The court, governed by a liberal policy, will add a reasonable encouragement, which the generous and humane will hardly need, to prompt men to exertions to relieve their fellow-men in danger and distress. But we must remember that the policy of the law is not to provoke or satisfy the appetite

of avarice, but to hold out an inducement to such as require it, to make extraordinary efforts to save those who may be encompassed by perils beyond their own strength to subdue."

Salvage, therefore, is a reward or bounty, exceeding the actual value of their services, given to those by means of whose labor, intrepidity, and perseverance a ship or her goods have been saved from shipwreck or other dangers of the sea. 1 Bell, Com. 592. How to give such recompense as may fairly reward the labor, intrepidity, and perseverance of salvors, and encourage them to exertion and honesty in relieving ships, goods, and persons in danger, and at the same time to prevent excessive exactions in the moment of alarm, is a difficult problem; and a court must deal with each case before it according to its own particular circumstances, and with reference to the liberal aims of the law as explained by the jurists whose expressions have been quoted. It may be laid down as a cardinal principle of salvage that the rate of compensation to be allowed in any case must not only contemplate the labor and exertion and danger attending the particular enterprise, but must be so liberal, if the condition of the fund at disposal permit, as to attract public attention; the court looking not merely to the exact *quantum* of service performed and its actual value, but to the general interests of navigation and commerce, which depend for protection upon services of this character.

I have emphasized this latter feature of the policy of the law of salvage, because there is a growing complaint among wreckers and salvors that the admiralty courts of our Atlantic coast, more particularly those of New York, have until quite recently been disposed for a long time to ignore it in their awards of salvage, and to confine themselves too much to the *quantum meruit* view of the value of salvage services. Whether the policy of the courts has been too restricted or not in this respect is not for me to say; but the fact is, whether resulting from this or other causes, that almost every wrecking company which has operated along the Atlantic seaboard in the last 50 years has ceased to exist.

In this country we have no legislation having for its object the encouragement of salvors, like the merchants' shipping act of Great Britain, 17 & 18 Vict. c. 4, §§ 458 *et seq.*; and the duty of affording this encouragement devolves upon the admiralty courts; and I think it is generally conceded that unless these courts are more liberal in their awards of salvage than they were for a considerable period until recently, the business of wrecking as an organized pursuit, conducted by reputable men, will soon be wholly abandoned. Certainly, if it be

the policy of the law and of humanity for the courts to encourage by liberal bounties the rendering of aid to persons and property in peril at sea, that encouragement ought not to be doled out so illiberally as to destroy all organized and reputable wrecking companies on our sea-board.

I do not propose in the case at bar, however, to make any violent departure from the policy of our American decisions. I think a more liberal policy has already been inaugurated in most of our courts, especially by the supreme court of the United States; its decisions in the cases of *The Camanche*, 8 Wall. 448, and *The Black-wall*, 10 Wall. 1, being conspicuous pioneers in the line of a liberal policy.

The recent cases in the English high court of admiralty of *The Hebe*, L. R. 4 Pro. Div. 217, and of *The Craigs*, L. R. 5 Pro. Div. 186, indicate a liberalized policy in England also.

The leading considerations to be observed in determining the proportion or amount of an award for salvage service are well defined. I do not know where they are more explicitly stated than in the instructions given in 1865 by the British board of trade to the receivers of wrecks of Great Britain. Embodying the result of the decisions of the English and American courts of admiralty, the board of trade then laid them down as follows. We are to consider :

- (1) The degree of danger from which the lives or property are rescued.
- (2) The value of the property saved.
- (3) The risk incurred by the salvors.
- (4) The value of the property employed by the salvor in the wrecking enterprise, and the danger to which it was exposed.
- (5) The skill shown in rendering the service
- (6) The time and labor occupied.

These are the ingredients which must enter, each to a greater or less degree, as a *sine qua non* into every true salvage service; and to these I will add, not as an ingredient so much as a consideration to be taken into view :

- (7) The degree of success achieved, and the proportions of value lost and saved.

Employing the language of well-settled law, the board, in the same instructions, among other things, say :

"In estimating the degree of danger regard should be had to the damage sustained by the vessel itself, the nature of the locality from which she was rescued, the season of the year when the services were rendered, and, if the

weather at the time was not tempestuous, the probability of its becoming so, and the ignorance or knowledge, as the case may be, of the master or other person on board the vessel."

With these points in view, I will comment briefly upon the case of the Sandringham.

1. That the ship was in imminent danger, at several periods of the work of saving her, is perfectly plain. Her master, Capt. McKay, had utterly despaired of saving her himself. She had beached at 5 p. m. on the fifth of November. He had left her two hours afterwards to call for help, and did not return until 12 m. the next day. During the early morning of the 6th, when it may have been practicable for him to lay his anchors outside by using the ship's boats, and to have taken measures for pulling her off the beach with a cable, as was actually done in the sequel, he failed to make the effort, and did nothing during the 24 hours after the ship had beached, even to prevent her from thumping against the ground. In fact, he did nothing at all for 24 hours, for the help of the ship, except to keep the pumps going part of the time. It is abundantly proved that when the wreckers took charge, whatever might have been the case before, the ship was too deep in the sand, and had too much water in her hold and in the ballast tank, and too much avoirdupois of cargo on her decks, to be got off the beach by tugs or tows of any degree of power.

There was no recourse but to plant anchors out beyond the breakers to lay a cable to them from the ship to lighten her of the burden upon her, and then to pull her off shore—none of which her own master and crew were capable of doing.

The result shows that this course had become indispensable at 6 p. m. on the 6th, when the wreckers took charge; for with all their extraordinary force of men, material, and machinery the wreckers were unable for five days of lightering the ship, and of constant heaving on the cable, to wrench the ship out from the dangerous sand-bed in which Capt. McKay left her; and, even on the fifth day, they succeeded in moving her, according to the log-book, only 30 feet.* That the condition of ship and cargo was hopeless without the aid of the wreckers, is shown by her master's failure to do anything for her relief for 24 hours after the beaching; by his earnest calls for help from Norfolk; and by leaving his ship with her crew to seek personal safety, apparently in despair of her, 24 hours after the

*See note on page 565, where it is conjectured that the second mate meant yards or fathoms when he wrote feet in the log-book.

beaching, without expressing any intention to return; indeed, it is self-confessed. The ship was in so great danger during the night after this abandonment, (the night of the 6th,) from the storm that came on, that it is not unreasonable to conclude that she would have bilged and broken up, so that it would have been necessary to have removed her cargo by gunpowder, if the wreckers, fortunately getting a hold on her with their cable at 6 p. m., had not stood manfully by her all through the night, holding her firm with their cable, made taut by means of the capstan, and by means of rope and tackle; for they were unable to use the ship's engines on the winches by reason that the ship's engineer had banked his fires and locked the engine-room before going on shore. Moreover, the ship was not only in this immediate danger of hopeless wreck, but there was no help within reach, which would have been at all adequate to the emergency, except that which was furnished with promptness and amplitude by this defendant.

The ship was again in equal danger on the night of the 10th, and was a second time saved by the stout efforts of these wreckers. Still again, on the 13th, when she had been finally got afloat by efforts exceptionally judicious, skilful, and successful, she escaped by less than an hour another storm more dangerous than either of the first two, which came on as she was entering Chesapeake bay, and which would have beached her a second time if she had remained but a little while longer outside. For it is not true, as some contend, that narrow escape from a subsequent storm by means of the forecast, skill, and expertness of salvors is not to be considered in cases of this character. See remarks of the courts, *passim*, in *The Earl of Eglinton*, Swabey, 8, and *The Birdie*, 7 Blatchf. at p. 240. See, also, 2 Parsons, Shipp. & Adm. 284, 285.

As to the question of derelict, it has no other connection with this case than as an incident of the danger in which the vessel was when the salvage service was undertaken. A vessel may be a derelict in the eye of the law, and as affecting the amount of the salvage reward, though it may not have been a derelict in fact. It has been held that if a master and crew leave their ship for the safety of their lives, a mere intention of sending a steamer after her does not take away from her the character of a legal derelict. *The Coromandel*, Swabey, 205. If a ship be abandoned by a master and crew, *sine spe recuperandi*, (without hope of recovering her by their own exertions,) which was the case as to the Sandringham and her cargo, it has been held to be a derelict in so far as the amount of the salvor's remuneration

is concerned. *The Genessee*, 12 Jurist, 401; *The Columbia*, 3 Haggard, 428. But the question of derelict is no longer of much importance in cases where the amount of salvage claimed does not exceed half the value of the property saved.

2. The ship and her cargo having been in extreme peril, and been saved, the second consideration is as to the value of things saved. In this case the value of the cargo, \$150,000, was readily ascertained by the market prices of cotton. The value of the ship was fixed at \$36,000 by the survey that was ordered soon after she was brought off the beach into port. In her then apparently dilapidated condition, and in the reasonable apprehension that she might have been strained by lying for a week on the beach, this valuation may have been much lower than was justified by subsequent developments. She was repaired at the cost of only \$14,000, which placed her value when in the hands of her owners, ready to set sail for Liverpool, at only \$50,000, which was probably not much more than half her real value. If the salvage is to be estimated by a percentage or proportion, it might be just for me to consider this state of the case in fixing the award; but as the valuation has been treated at the hearing as a thing agreed upon and not in dispute, I will consider the value of the ship to have been only \$36,000.

As to the freight, the saving of ship and entire cargo put the ship in condition to make good her contract of affreightment by completing her voyage, and earning the entire freight agreed upon. It has always been claimed, and with some reason, that in such a case as this the whole freight should be estimated in making up the aggregate value, part of which is to be awarded for salvage. I think, however, the weight of authority has settled that the freight to be considered is only such proportion as the distance at which the salvage service was rendered from the port of departure bears to the whole voyage. In the present case, the distance of Norfolk as between Galveston and Liverpool being about half way, the value of freight to be considered must be half the whole, or \$7,000. *The Norma*, Lush. 124; Jones, Salvage, 91.

3. As to the risk incurred by the salvors in this case, though their labor was long-continued, it cannot be regarded as having involved extraordinary risk to men experienced in wrecking, and accustomed to the dangers of the sea. Risk to salvors is only of importance as affecting remuneration. It is not a necessary element in salvage, but only a circumstance to be considered as enhancing their reward, if the risk be great. Jones, Salvage, 4; *The Pericles*, B. & L. 80;

The Bomorsund, Lush. 77. I do not think the risk to the persons of the salvors of the Sandringham and cargo, experienced seamen as they were, was great enough to materially enhance the award in this case.

4. The value of the property of the libellant which was employed in this enterprise is not shown with accuracy anywhere in the evidence in the case. The steamers, schooners, barges, boats, and some of the material that were employed are mentioned in the depositions; and there is scattered evidence indicating their approximate value. I judge from all that appears on the subject that the property sent to the rescue of this ship by the libellant must have been worth, certainly must have cost, at least \$50,000. This property, from the nature of the business in which it was used, was not insurable, and was necessarily put at hazard on a dangerous coast, in the stormy month of November, in a wrecking enterprise conducted among reefs and breakers close to the land. These circumstances must in justice be brought into consideration in estimating the salvage to be awarded in this case.

5. Of the skill shown in this enterprise, occurring where it did and when it did, and occupying a full week, the highest proof is its complete success. Indeed, the fact that these wreckers accomplished their work so very thoroughly and successfully as they did, is used by the respondent as an argument that it could not have been laborious, difficult, or hazardous. But I think the evidence in the cause forbids such an inference. It shows that the task performed by these wreckers was exceptionally arduous, faithful, and meritorious; and, in such a case, the court is forbidden by one of the fundamental maxims of the law of salvage to treat the complete success of the enterprise in any other light than as entitling to an enhancement of reward. To treat the fact of success as depreciating the merit of such an enterprise, would be to cut up by the roots the whole theory and policy of the law of salvage. Success is, indeed, not always the test of merit; but yet nothing could be more subversive of all good policy in human affairs than the opposite doctrine, that it is a proof of demerit. Of course, the idea cannot be tolerated in the present case.

6. The time and labor occupied in this enterprise were extraordinary, and such as are shown by but few admiralty cases. There were half a dozen or more considerable vessels, several surf and other boats, and nearly 100 men engaged every day for a week; and the work was done in rough weather, at a tempestuous season of the year,

when it was necessarily attended by much exposure, both of property and person. It went on for a week. The wreckers were laboriously employed, not only in the day-time whenever the weather and sea would permit, but on one or two occasions in the night-time when the ship was in especial danger. This extraordinary length of time and extent of service must, in justice, enter prominently into consideration in determining the amount due this libellant.

I come now to consider the more general relations of this case to the law of salvage. It would be an unprofitable task to examine in detail the many decisions in salvage cases that have been cited by counsel on each side from the admiralty reporters in their exhaustive studies of the subject. A peculiarity of admiralty cases, more marked than in those illustrating any other branch of the law, is that there are seldom any two cases that are alike in more than one or two of their features; while they are so dissimilar in all other features as rarely to afford much ground for safe comparison. But I think they do show generally that the old rule of allowing to the salvors, arbitrarily, in every case, half the values saved, no longer obtains. Indeed, that rule came at last to so revolt the courts of admiralty that in their repugnance to it they went far towards the other extreme, and manifested a temper to confine themselves too much in their awards to the *quantum meruit* estimate of salvage services. There has latterly, however, been a recurrence from extreme views in that direction to the middle ground, of adapting the amount allowed to the circumstances of each particular case; giving always the *quantum meruit*, and giving also, when the case admits of generous treatment, as liberal a *bounty* as may be just and proper. For there are many cases in which, however meritorious the service may have been in respect to all the ingredients of salvage service that have been discussed, and however anxious the courts may have been to grant the *bounty*, yet the fund in hand for disposal did not afford the allowance of more than "*adequate remuneration*."

Admit that a ship and cargo have been in great danger, and that the services of the salvors have been exceptionally meritorious, and such as ought to be rewarded by the court with liberal hand; yet how obvious is the reflection that this may not be done at all with any justice in some cases, but may be justly done with free hand in others. And this brings me to the seventh consideration proper to be observed in an ordinary salvage.

7. In the case of the *Isaac Allerton*, Marvin, Wrecks & Salvage, 122, (note,) the court in awarding half of \$96,000 for salvage, said:

"It is a settled rule of decision in this court, from which it rarely or never departs, that the amount of salvage in a case where the vessel is lost shall be less, though the proportion may be greater, than in a case where the vessel is saved, *ceteris paribus*; and, in proportion somewhat to the promptness and skill with which a vessel is rescued from peril, is the reward to be increased. The reasons for this rule are several, but one is very obvious. When the vessel is lost there is usually a great loss of property; and we are not to aggravate this loss by charging the little that may be saved with a greater salvage than the claims of simple justice to the salvor may demand; and the claims of simple justice to the salvor do not, ordinarily, extend beyond a fair compensation *pro opere et labore*. All beyond this is gratuity, given or withheld by the courts upon grounds of public policy. When the vessel and a large amount of property have been lost, and a fragment only saved, there is little reason, and less means, for giving gratuities. But when the vessel and entire cargo have been rescued from certain peril, a substantial service has been rendered the owners by preventing a loss; they can afford a more liberal reward; and sound policy dictates the propriety, and the amount of property saved furnishes the means, of making a liberal remuneration. Hence the interests of owners and wreckers are made to harmonize."

Of course the learned judge, in the foregoing just observations, does not intend to declare that there are no cases in which salvors are to be allowed a liberal bounty over and above ordinary wages, even though much property was lost and its owner distressingly impoverished; but in the great majority of cases his principle is eminently just, and I thoroughly concur in the rule of action which he propounds. And therefore I do not agree with counsel in this case in their opposing views on the question whether the percentage allowed for salvage shall be less on large values rescued than on small ones, or whether it shall be greater. I think, with the court, in the case of *The Isaac Allerton*, that the proportion of the property lost must enter into consideration. In a case in which, out of property worth \$200,000 in danger, only the value of \$50,000 was rescued, I would give a smaller percentage for salvage than I would in a case where, other circumstances being equal, property worth \$50,000 was in danger and was all saved. In the first case, other circumstances being the same, and the service such as equally to deserve a liberal allowance, I might feel it unjust to give more than *one-tenth*; while, in the second, I might think it equally unjust to allow less than one-half.

The many cases cited in the arguments of counsel show, apparently, a great latitude of discrepancy in the amounts of salvage decreed; yet I think if they are studied with some reference to the proposition set forth in *The Allerton Case*, they can be well nigh harmonized. But, whether with or without reference to this consideration, I will now proceed to notice some of the cases cited at bar.

In the case of *The Thetis*, 3 Haggard, 14, much relied upon by counsel for the respondent, one of his Britannic majesty's ships, having on board bullion to the amount of \$810,000, belonging to private persons, sank off the Brazilian coast in a cove or inlet between two islands. The salvage was effected by vessels and their crews of his majesty. It was a case, as the judge said, "quite out of the ordinary class of salvage cases;" alluding, I suppose, to the fact that the treasure was private property, was lost by a public vessel, and was recovered by ships and persons in the government service. It had been for a long time held in England that where persons in government employment effected salvage, they were to be allowed "adequate remuneration;" but it had not been held that they should also be allowed the stimulent of the *bounty* which is awarded to voluntary salvors who are not employed in the public service. The case is described in the syllabus as one of "salvage of private treasure and government stores (lost on board a king's ship) by officers and men of the royal navy. Comparative claims of the admiral and subordinate officers. One-fourth of gross value awarded. Upon appeal a further sum awarded of £12,000, (\$60,000.) Gross quantity of the treasure recovered, £157,000, (\$785,000.) The whole sum deducted for salvage, admiralty claim, and for expenses being £54,000, (\$270,000.)" The work of salvage had consumed 18 months, and had employed a good many men, and several ships, as well as expensive material. Here there was loss by a public ship of nearly half of a private treasure. The salvage was performed by public vessels, and by persons in government service; and, notwithstanding the outright loss of nearly \$25,000, there was allowed in the form of salvage (or further loss) more than one-third of what was saved. In the previous case of *The Mary Ann*, 1 Haggard, 158, the question was whether the officers and crew of a revenue sloop of his Britannic majesty, whose duty it was to give aid to distressed British vessels, should be awarded salvage in a case in which they had come to the aid of a ship in great distress, bound from Jamaica, and found in utter helplessness off the

western coast of Ireland. She had been under continued stress of weather, was full of water, was out of provisions, and was drifting fast towards the rocks. She was boarded, and the ship and cargo, though greatly damaged, saved. The demand of the libel was "for remuneration of salvage services," not for the extraordinary bounty given to voluntary salvors. The court said:

"Undoubtedly the parties may fairly claim a remuneration. Although the ship belongs to the state, and although there is an obligation upon king's ships to assist the merchant vessels of this country; yet, when services have been rendered, those who confer them are entitled to an *adequate reward*."

In this case there had been great loss; there was far from a complete saving of property; it was saved by men whose duty it was to attempt the task; and yet, although the salvors demanded and could only recover a fair remuneration for their services, the court awarded *one-tenth*.

In the case of *The Amerique*, 1 Am. Law & Eq. 17; S. C. L. R. 6 Priv. Co. App. 468, only 10 per cent. was given, although there was no loss of ship and cargo, the steam-ship *Amerique* having been found floating in the ocean abandoned by officers, crew, and passengers, and having been simply towed into port. It was a case of technical derelict, but the other ingredients of a salvage service were wanting. The court gave but one-tenth, on the express ground that the services rendered were inconsiderable, and the demand out of all proportion to them. When enterprising mariners find a ship worth hundreds of thousands of dollars floating quietly on the ocean, it does not require the stimulant of a 25 or 50 per cent. bounty to inspire them to tow her into port. The court looked at the reason of the law, and not at the letter, in this case, and refused to "stick in the bark."

In the American case of the *Steam-ship Swiftsure*, 4 FED. REP. 463, the ship, mistaking the channel, went ashore on the sand beach north of Cape Charles at 9 A. M. of a clear day in May, 1880, on a smooth sea, and lay there until 2 o'clock waiting to be floated off by a tide; her chief officers drunk. At that hour two very strong steam-tugs, which, in pursuing their regular business, had been looking for vessels coming in to be towed, came along-side, and on being asked to go to work, made fast two hawsers to the stern of the ship, and the two tugs, pulling together, and aided by the powerful propeller of the ship, soon got her afloat and out to sea, when they let

her go, and she came herself into the port of Baltimore. The value of ship and cargo together was \$125,000. There was no damage; everything was saved. Here the owners could well have afforded the allowance of a liberal *bounty*, in addition to a fair remuneration for actual service, if the case had contained the ingredients which make up every true salvage service; but it did not contain those ingredients. The danger of the ship at 2 o'clock, whatever it might have become 12 hours later, after night had supervened, was in fact very inconsiderable; and the service of the two tugs was very little more than that of towage. The salvors were in absolutely no risk. The skill shown was no more than what the rudest tugmen who had never seen a wreck might have exhibited. The time was but three hours; for the tugs were already out there in the course of their regular calling, looking for tows. The judge thought that the ship was only in prospective peril, because, at the time the tugs went to work with her, the wind and sea were increasing, and that part of the coast was dangerous, and liable to sudden storms. This peril was the only salvage ingredient in the case, and it was prospective. But for it the service would have been strictly one of towage. And so the judge says, as if apologetically for admitting the element of *bounty* in his award at all:

"The allowance in such cases is intended to be sufficiently liberal to make every one concerned eager to perform the service with promptness and energy, and also to encourage the maintenance of steam-vessels sufficiently powerful to make the assistance effective. It would be contrary to the spirit of the maritime law to reduce the salvage compensation below the standard of liberal inducement, and it would equally frustrate its purpose if the allowance should be so large and so out of proportion to the services actually rendered as to cause vessels (in critical situations) to hesitate or decline to receive assistance because of its ruinous cost."

And so, rejecting the demand for \$40,000 as exorbitant, the judge awarded the sum of \$2,500.

In the case of *The Blackwall*, 10 Wall. 1, where a ship on fire at anchor in the harbor of San Francisco was saved by city firemen, aided by a tug, there was much damage by the fire, and the water thrown by the firemen; but the ship and cargo, after the extinction of the fire, were valued at \$100,000. The firemen were at work 30 minutes. Though the ship was in great danger, neither the firemen nor their engine, nor the assisting tug, were in any serious danger, if any danger at all, during the service. The case was wanting in some of

the important ingredients of salvage services, yet the court allowed *one-tenth*.

In the case of *The Camanche*, 8 Wall. 448, valuable property designed for the construction of a naval monitor was sunk in or near a dock in the harbor of San Francisco. The libel was for salvage on that proportion of the property which was not insured, worth \$75,000; the service for the proportion which was insured having been compensated by contract. The service consisted in saving heavy material from the bottom of the harbor by means of diving bells and lifting machinery. It could only be done by skilled men, and by the use of expensive machinery. The labor was arduous. The work was attended with danger and great difficulty. It lasted from January 28 until May 20, 1864, nearly four months. The amount allowed was one-third of the value saved; the salvors receiving proportionate compensation in addition from the insurance companies.

I need not pursue the examination of reported cases further. I have referred to these that have been named only for the purpose of illustrating the principles of my present decision.

The case of the *Sandringham* was one into which every ingredient of a true salvage service entered materially. The ship herself was in great peril; indeed, her condition was well nigh hopeless. In the event of her sinking in the sand, filled with compressed cotton tightly compacted, the cargo could only have been saved partially, with difficulty, and in a damaged condition. The task of the wreckers was full of toil and risk, performed as it was on a dangerous coast, liable to sudden storms and sea-swells. The work was bravely undertaken, perseveringly and faithfully pursued, and successfully accomplished. There were several steamers engaged, which are always accorded a higher compensation than other vessels. 8 Wall. 471; *The King-alock*, 1 Spinks, 267. There were schooners, barges, surf-boats, and much valuable wrecking material also at hazard, without insurance. There was no loss to the owners; every bale of cotton was saved, and not a bale was damaged.

I think the services and the precedents concur in justifying an award of one-fourth of the aggregate values saved, estimating that aggregate value to be \$193,000. I will decree one-fourth of that amount and costs.

I have been thus elaborate in setting forth the grounds of my award in this case because of the language used by the supreme court of the United States, (8 Wall., on page 479:)

"Appellate courts are reluctant to disturb an award for salvage, on the ground that the subordinate court gave too large a sum to salvors, unless they are clearly satisfied that the court below made an exorbitant estimate of their services."

I have desired that in the event of an appeal from this decision the facts and principles on which it is based may be fully understood by the courts above.

Thirty days will be allowed for an appeal. There was no appeal.

NOTE. The amount of salvage to be awarded must be estimated by the compound consideration of the danger and importance of the service, and the value of the property saved is an essential circumstance in estimating the latter.(a) The long-settled practice has been to view the compensation for such services as a reward for bravely encountering the perils of the seas in the interest of commerce and navigation;(b) and it should always comprehend a reward for the risk of life or property, labor and danger, and should be so liberal as to afford inducement to exertions to save life and property.(c) Effective service by steam-vessels should be particularly encouraged.(d) If the service is merely that of ordinary towage, as a general rule only the usual towage compensation is to be given,(e) in addition to the expense and time of going out to render the service;(f) but the reward, even in derelict cases, should be governed by the general principles, namely: danger to property, value, risk, risk of life, skill, labor, and duration of service,(g) and the large value at risk.(h)

As to the amount of compensation for salvage service, there is no fixed rule nor precedent nor practice in admiralty,(i) and there is no rule but that which a sound discretion may suggest upon a view of all the circumstances of each particular case.(j) The court may reward not only according to the merit of the service, but also in proportion to the value of the property rescued;(k) and the leading and dominant consideration ought to be the benefit arising to the owner.(l)

Salvage is generally decreed on all property salvaged, whether ship,(m) cargo,(n) or the freight,(o)—ED.

(a) *The Elvira*, Gilp. 60.

(b) *The Blaireau*, 2 Cranch, 240; *The Sarah*, 1 C. Rob. 313, note; *The William Beckford*, 3 C. Rob. 286; *The Hector*, 3 Hagg. Adm. 90; *The Clifton*, Id. 117; *The Industry*, Id. 23.

(c) *Bond v. The Cora*, 2 Wash. C. C. 80; *The Steam-ship Swiftsure*, 4 Fed. Rep. 463.

(d) *The William Penn*, 1 Am. Law Reg. 584; *The Raikes*, 1 Hagg. Adm. 246; *The Allen*, Swab. 190; *Atlas Steam-ship Co. v. Steam-ship Colon*, 4 Fed. Rep. 469.

(e) *The Princess Alice*, 3 W. Rob. 138; *The Harbinger*, 20 Eng. L. & E. 641; *The Albion*, 2 Hagg. Adm. 180, note; 3 Hagg. Adm. 254.

(f) *The Graces*, 2 W. Rob. 294.

(g) *The Ship Sullote*, 5 Fed. Rep. 99; *The Bark Lovetand*, Id. 105; *The John E. Clayton*, 4 Blatchf. 372; *Post v. Jones*, 19 How. 150; *The Leander. Bee*, 260; *The Ebenezer*, 8 Jurist, 385; *The Henry Ewbank*, 1 Spr. 400.

(h) *The Ship Sullote*, 5 Fed. Rep. 99; *The Henry Ewbank*, 1 Sumn. 400; *The Earl of Eglinton*, Swab. 7.

(i) *The B. C. Terry*, 9 Fed. Rep. 920; *The Thetis*, 3 Hagg. Adm. 14; *The Steamer Leipsic*, 5 Fed. Rep. 109.

(j) *Bond v. The Cora*, 2 Wash. C. C. 80; *Tyson v. Prior*, 1 Gall. 133; *The Mary E. Long*, 7 Fed. Rep. 364; *The Levi Davis*, 9 Fed. Rep. 715; *The B. C. Terry*, 9 Fed. Rep. 920.

(k) *The Waterloo*, Blatchf. & H. 114; *The Plymouth Rock*, 9 Fed. Rep. 413.

(l) *Taylor v. The Cato*, 1 Pet. Adm. 48.

(m) *The Selina*, 2 Notes of Cas. 18.

(n) *The George Dean*, Swab. 290; *The Mary Pleasants*, Id. 224.

(o) *The Peace*, Id. 115; *The Norma*, Lush. 124; *The Dorothy Foster*, 6 C. Rob. 88; *The Progress*, 1 Edw. Adm. 210; *The Racehorse*, 3 C. Rob. 101.

THE LEIPSIC.*

(Circuit Court, S. D. New York. February 7, 1882.)

1. SALVAGE SERVICE.

The steam-ship L., bound from Baltimore to Bremerhaven, broke her shaft when about 320 miles from Sandy Hook. After endeavoring for seven days to reach the nearest port of the United States under sail, during which time she refused offers of assistance, her captain, when within 125 miles of Sandy Hook, signalled for assistance and requested a passing bark to send aid. The bark, after proceeding some 40 miles, spoke the steam-ship G., bound from Newport, England, to Baltimore. The G. went to the assistance of the L. and towed her to New York. *Held*, to be a salvage and not a mere towage service, and that the crew of the G. were entitled to share in the award.

2. SAME—COMPENSATION—AGREEMENT BETWEEN CAPTAINS.

The captains of the two steamers, before the L. was taken in tow, entered into an agreement whereby the G. was to tow the L. to Sandy Hook for the sum of £3,000, "but leave it to the court to prove the said agreement." *Held*, that the agreement was made subject to the approval of the court as to the amount, and that the court should award a proper compensation, on a *quantum meruit*, notwithstanding the agreement.

In Admiralty. On appeal from the district court.

Lorenzo Ullo, for libellants.

William D. Shipman, for claimant.

BLATCHFORD, C. J. In this case I find the following facts:

The screw steam-ship Leipsic, of about 2,000 tons burden, one of the regular line of steamers of the North German Lloyd, plying between Bremerhaven and Baltimore, left the latter port, bound for the former, at 2 P. M. on the fourth of September, 1879, with a general cargo and 12 steerage passengers. She passed Cape Henry on the 5th, at 4:45 A. M., and proceeded to sea. On the 6th, while the weather was fine, the wind northerly, and the ship running at about 10 knots, that portion of her propeller shaft known as her "first transmission shaft" broke. This accident deprived her of the power of propulsion by steam. She was then in the gulf stream, in latitude 37 deg. 58 min. N., and longitude 68 deg. 43 min. W., and about 320 miles from Sandy Hook. Her sails were all set, and she was immediately hove to in order to disconnect her screw-shaft from the remainder of the shafting between the screw-shaft and the point of the fracture, so that the screw-shaft could revolve freely when the ship was in motion. This was done by dropping down that portion of the shaft between the fracture and the screw-shaft. Then, when the vessel was in motion, the screw-shaft revolved freely in its bearings. The ship was then put under sail on a W. N. W. course, intending to reach the nearest port on the Atlantic coast of the United States. She was in all respects, except as to the injury to her machinery, staunch and strong, well

*Reported by S. Nelson White, Esq., of the New York bar.

manned, equipped, and provisioned. She continued under sail till the 13th, when the libellant's ship took her in tow.

The Leipsic made about 25 miles from 2 p. m. on the 6th to noon on the 7th. The next 24 hours she made about 10 miles; the next 24 hours, 41 miles; the next 24 hours, 38 miles; the next 24 hours, 52 miles; the next 24 hours, 50 miles, bringing her down to noon of the 12th. From that time to noon, on the 13th it was nearly calm, and the current carried her 20 miles north-easterly. On the 9th, at 1:30 p. m., she was passed by an English steamer, which made an offer of assistance, which was declined by the captain of the Leipsic on the ground that he did not need assistance. During the days the Leipsic was under sail she sighted several steamers, but she made no signals for assistance. On the 12th, her captain, the wind having died away, had decided that it was necessary for him to reach a port quicker than he could do so under sail; that his only means of so doing was to be towed in by a steamer; and that the saving of time thereby was an advantage to the ship and her owners from a business point of view. For that purpose, when he went below on the night of the 12th he ordered rocket signals to be thrown up whenever a steamer should pass. One did pass at a distance of five or six miles, but failed to heave to or answer the signals. About noon of the 12th the Leipsic had spoken a bark bound for the Delaware breakwater, and asked her to report the steamer as being there with a broken shaft.

About 8 or 9 o'clock on the morning of the 13th the steamer Gresham, bound from Newport, England, to Baltimore, Maryland, in ballast, overtook the bark, which had been previously spoken by the Leipsic, and was informed by the bark that there was a steamer to the eastward with a broken shaft, giving her supposed latitude and longitude. The Gresham was immediately put about, and proceeded in the direction indicated, which was nearly opposite to her former course. At about noon on the 13th the Gresham, having proceeded 40 miles from the point where she was spoken by the bark, appeared in sight, and the Leipsic signalled her that she had a broken shaft. The Gresham came up to her, and, when within hailing distance, her captain asked the Leipsic if she wanted a tow, and the reply was that she did. The captain of the Gresham then went on board of the Leipsic, and the latter showed the former the position of the ship on the chart—39 deg. 28 min. north latitude, and 71 deg. 25 min. west longitude. The reckoning of both ships agreed. Measurements were made on the chart, and Sandy Hook was found to be distant 125 miles and to be the nearest port. The captain of the Gresham was then asked what he would tow the Leipsic to Sandy Hook for. The two captains differ as to the price that was named,—one testifying that it was £6,000, and the other that it was £4,000. The captain of the Leipsic told the captain of the Gresham that if he did not come down any further the ship was in very good sailing order, he had all his square sails set, and that he could help himself in any weather with his ship under sail. During the negotiations another steamer hove in sight, about five miles off, and within signalling distance; but she was not signalled, and night was coming on, and the captain of the Gresham insisted that he was first on the ground. The captain of the Leipsic said to the captain of the Gresham that there was a

steamer near by which could give him equal assistance. Finally an arrangement was concluded, as set forth in the following paper, signed by both captains on board of the Leipsic:

"Latitude 39 deg. 30 min. N., longitude 71 deg. 25 min. W., September 13, 1879. It is this day agreed between Capt. F. Pfeiffer, of the S. S. Leipzig, and Capt. Gibl, of the S. S. Gresham, to tow the said steamer Leipzig, to Sandy Hook for the sum of three thousand pounds, (£3,000,) but leave it to the court to prove the said agreement."

The words, "but leave it to the court to prove the said agreement," were added before the agreement was signed.

The master of the Leipsic refused to make the agreement except upon that condition, because he thought the sum named too high. He is a German, but he spoke English, and the conversation was in English. The master of the Leipsic asked to be towed to New York, saying that he would make his repairs there. The master of the Gresham told him it would be out of his course, but that the Delaware breakwater was in his way; but he would take him there or to Sandy Hook, as he pleased, and the latter place was agreed upon. The weather was good, and the sea was smooth. The wind was very light. The Gresham took the Leipsic in tow by two hawsers, furnished by the latter. They got under way soon after the agreement was signed, in the afternoon of the 13th, and passed Sandy Hook about 3 o'clock in the afternoon of the 14th, and proceeded about six miles up the bay, where the hawsers of the Leipsic were transferred to a tug, which towed her to Hoboken. The Gresham waited in the lower bay of New York a short time for some trifling repairs to her machinery, (such repairs, however, having no connection with the service rendered to the Leipsic,) and then proceeded to Baltimore. She arrived at the mouth of Chesapeake bay at 9. A. M. on the 16th. She had calculated to arrive there on the morning of the 14th. She was a freighting steamer of 1,092 tons net measurement. She was under charter to proceed to Baltimore, and there take on board a cargo of grain for a port of delivery in Great Britain or Ireland, or on the continent, between Bordeaux and Hamburg, both inclusive, but excluding Rouen, according to orders to be given on signing bills of lading. By the charter she was required to be at Baltimore not later than the twenty-fifth of September. The freight earned by her on her outward voyage from Baltimore was about \$13,750. The agreed value of the Leipsic is \$90,000, and that of her cargo \$160,945. The amount of her freight on that voyage was \$13,757.37. The value of the Gresham is \$90,000. The Leipsic was expected to make a round trip, at that season, every six weeks. By keeping her turn on her return trip she would presumably carry some 250 steerage passengers in addition to her cargo. The Leipsic at the time had six months' provisions on board. The captain of the Leipsic had commanded three steamers of the North German Lloyd, and up to the time of the trial in the district court remained in its employ. He was an experienced master. The service was rendered without accident. It was not attended with any special difficulty or danger. The weather was at first fair, and soon after they started the wind became fresher, and both vessels set all sail, and then they made for a

time about seven knots. The following night it became rainy and squally, and the wind getting around to the south-west, they proceeded under steam alone. The Gresham sustained no damage to her machinery in consequence of the towage, and suffered no loss of employment by reason of the delay. The Leipsic paid \$150 to the tug which towed her from the place where the Gresham left her to her dock in Hoboken. This was on Sunday, and there was no other tug there.

On the foregoing facts my conclusions of law are that the service was a salvage service; that the court ought to award a proper compensation on a *quantum meruit*, notwithstanding the agreement; that the £3,000 is an excessive amount; that the proper amount is \$5,500; that of that the owners of the Gresham should have \$4,125; that of the remaining \$1,375 the master of the Gresham should have \$150; that the remaining \$1,225 should be divided among the master, officers, and crew of the Gresham in proportion to the rates of their respective wages; that the \$1,375 remain in court till applied for; that the libellants have their costs in the district court, taxed at \$54; and that neither party recover any costs of this court.

SAM'L BLATCHFORD, Circuit Judge.

BLATCHFORD, C. J. The district court awarded \$3,750 to the owners, master, and crew of the Gresham, of which three-fifths was to go to the owners of the Gresham and two-fifths to her master and crew; the master to have one-tenth of the two-fifths, and the officers and crew, including the master, to have the remainder, in proportion to the rates of their respective wages. This gave to the owners \$2,250; master, \$150; master, officers, and crew, \$1,350. The libel was filed by the owners alone, on the agreement, and not as in a cause of salvage, for owners, master, and crew. The court ordered the \$1,500 to remain in the registry to await an application for it by the master, officers, and crew. The libellants have appealed to this court because the district court set aside the contract and did not allow the £3,000. The claimant has appealed on the ground that too much was allowed.

The district court held that the agreement was made subject to the approval of the court "as to the amount therein named, £3,000, as the amount to be paid for the towage service;" that the amount suggested by the agreement was very greatly in excess of the amount which the court would award for the same service; and that, under the circumstances, the service was a salvage service.

It is contended for the libellants that what the parties agreed to leave to the court was, not to approve the sum of £3,000, but to

approve the agreement,—that is, to inquire into the circumstances under which the agreement was made,—and that otherwise their position in court would be as if no agreement were made. There was no disagreement between the parties as to what service was to be rendered, or as to the place to which the Leipsic was to be towed. The Gresham was to tow the Leipsic, and was to tow her to Sandy Hook. The only dispute was as to the compensation. The captain of the Gresham wanted more than £3,000. The captain of the Leipsic insisted on less than £4,000. The captain of the Gresham came down to £3,000. The captain of the Leipsic refused to make the agreement unless the added words should be added, because he thought £3,000 too high. Under these circumstances, the words “prove the said agreement” can mean nothing except “approve the said agreement for £3,000 as to its amount.” That being so, the court is at liberty to inquire whether the £3,000 is a sum which would be awarded if there were no agreement.

On the facts of this case I think this was a salvage service. Unable to use her steam machinery, it not appearing that it could be repaired at sea, having rejected offered assistance from a steamer, neglecting to signal passing steamers, keeping this up until the 12th, ordering rocket signals to steamers that night, hailing the bark on the 12th to report her with a broken draft, the Leipsic induced the Gresham to go back 40 miles to find her. She was drifting north-easterly in the current of the gulf stream, which was a direction in which she did not want to go. She was under sail for seven days. In six days she had sailed but 216 miles. She was still 125 miles from Sandy Hook, and approaching the coast near the equinoctial season. Within the rule laid down in *The Princess Alice*, 3 W. Rob. 138, there was here certainly something more than employment to expedite a voyage,—something more than accelerating the progress of the Leipsic. She was to be taken to a port to which she was not destined to repair her disabled machinery. In *The Reward*, 1 W. Rob. 174, it was said:

“Mere towage service is confined to vessels that have received no injury or damage;” and “mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident.”

The law as laid down in *The Princess Alice* was approved by the privy council in *The Strathmore*, L. R. 1 App. Cas., 58. The cases of *The Reward* and *The Princess Alice* were cases of assistance by steam-tugs to sailing-vessels. In *The Jubilee*, 42 Law Times Rep.

(N. S.) 594, a steamer which carried fore and aft sails only, and was not rigged for proceeding under sail alone, had broken the main shaft of her propeller. She put up signals of distress, and was towed by another steamer 40 miles into a port to which she was not bound. It was urged that she was making fair progress towards a safe port by means of her sails, under no circumstances of danger. The question arose directly whether the service was salvage or towage, because the towed steamer had paid to the other a sum for the service, and the crew of the towing steamer put in a claim for a share in the money as salvage to be distributed. The owners desired to retain the whole, as towage money only. Sir Robert Phillimore held that the case was one of salvage and not of towage only, and gave to the crew a share of the money. Citing the case of *The Princess Alice*, he said:

"I think in this case the circumstances show that something more was required than expedition, and something more than mere acceleration of progress. Here was a vessel lying with her main shaft broken. The great difficulty of a screw steamer is invariably when her shaft is broken. In this case she put up two flags for assistance. I am satisfied that the principle is laid down in many cases that, under these circumstances, flags are put up on the ship for the purpose of obtaining salvage service. The service, therefore, in this case was one of a salvage character."

In the present case the *Leipsic* did what was equivalent to putting up flags for assistance or signals of distress by sending by the bark the message she did, and by ordering rocket signals to steamers on the night of the 12th, and by her signal to the *Gresham* when the latter came in sight. The present case is not at all like that of *The Emily B. Souder*, 15 Blatchf. 185. In that case it was held that there was mere expedition by towage in order to deliver passengers sooner at the port to which the towed and the towing steamer were both of them bound; and the master of the towing steamer neither did nor said anything at the time to indicate that he regarded the case as one of salvage. In the present case, asking even £3,000 for towing a distance of 125 miles was a clear indication of a claim to a salvage service.

The case is one of a *quantum meruit*, for salvage. The value of the *Leipsic*, cargo, and freight was over \$264,000. The value of the *Gresham* was \$90,000. In regard to the *Leipsic* there are these facts: She had lost the use of her steam-power; with the sails she had, and such winds as she had had, she would, at her prior rate of sailing, have been between three and four days in reaching Sandy Hook; she

was in the gulf stream, drifting north-easterly when it was calm; she was in good condition except as to her steam-power; she had tried sailing and had determined to abandon it, and was seeking assistance from steamers; delay had become serious, and her captain took the services of the Gresham, though he knew it would be under a claim for £3,000, rather than let the Gresham go, and trust to the other steamer in sight or to some other resource. In regard to the Gresham, she put back 40 miles, and went out of her way to a port to which she was not bound; she was delayed in all 48 hours; she had a charter to begin at Baltimore the 25th, which she might have lost; and the service was, in fact, not difficult or dangerous. I think the £3,000 is entirely too much. At the same time I think the \$3,750 is not enough. I award the sum of \$5,500. Of this the Gresham is to have three-fourths, or \$4,125. This is peculiarly a case where her owners ought to have a large share. Of the remaining \$1,375, the master of the Gresham is to have \$150, and the rest is to be divided among her master, officers, and crew, in proportion to the rates of their respective wages.

The district court awarded costs in that court to the libellants, as the claimant had made no tender. This was correct. As both parties have appealed, and each has had partial success, no costs in this court are allowed to either party.

NOTE. That towage is a salvage service, see *The Leipzig*, 5 FED. REP. 108; *The Ellora*, 1 Lush. 550. The compensation for salvage services, as salvage, should be sufficiently large to make every one concerned sufficiently eager to perform the service promptly. *Ehrman v. The Steam-ship Swiftsure*, 4 FED. REP. 463; *The Emily B. Souder*, 15 Blatchf. 185. The compensation should be just, (*The Mary E. Long*, 7 FED. REP. 364,) adequate, and liberal, (*Atlas Steam-ship Co. v. The Steam-ship Colon*, 4 FED. REP. 469,) and a proper reward. *The Bark Lovetand*, 5 FED. REP. 105.

There are two elements which enter into the amount of award, viz., adequacy of remuneration and a bounty given to encourage such services. *The Sandringham*, ante, p. 556.

Agreements for compensation made at sea are subject to the approval of the court, (*The Leipzig*, 5 FED. REP. 108,) and an agreement to pay excessive salvage will not be enforced. *Brooks v. The Steamer Adirondack*, 2 FED. REP. 387.—[ED.]

Where an ordinary towage service is commenced at an agreed sum, and an extraordinary service is rendered, the agreement may be set aside.(j) So, if the agreement be exorbitant, the court will not enforce it.(k) Where there is an agreement for an extra compensation the court will not increase the sum agreed upon because of some additional assistance rendered,(l) unless some material circumstance has been concealed;(m) but the concealment must be purposed, and the circumstance must be of importance.(n)

Agreements for compensation made at sea are subject to the approval of the court,(o) and an agreement to pay excessive salvage will not be enforced.(p)—[ED.]

(j) *The William Brandt*, 2 Notes of Cas. Supp. lxvii; and see *The Albion*, Lush. 282; *The Saratoga*, Id. 318; *The Minnehaha*, Id. 335; *The Annapolis*, Id. 355; *The Lady Egidia*, Id. 513; *The Edward Hawkins*, Id. 515; *The Pericles*, Brown & L. 60; *The White Star*, L. R. 1 Adm. Ec. 63; *The Galatea*, Swab. 349.

(k) *The Jacob E. Ridgway*, 8 Ben. 179; *Two Hundred and Two Tons of Coal*, 7 Ben. 343; *The*

Steamer Adirondack, 2 Fed. Rep. 337. See *The Leipsic*, 5 Fed. Rep. 109.

(l) *The Betsey*, 2 W. Rob. 167.

(m) *The Kingalock*, 1 Spinks, 263.

(n) *The Jonge Andries*, Swab. 226, 303.

(o) *The Leipsic*, 5 Fed. Rep. 108.

(p) *Brooks v. The Steamer Adirondack*, 2 Fed. Rep. 387.

MOORE and another v. O'FALLON and others.*

(District Court, E. D. Missouri. March 9, 1882.)

1. COURTS—JURISDICTION—BANKRUPTCY.

Where the jurisdiction of a United States district court over a cause depends upon the fact that one of the plaintiffs is the assignee of a bankrupt whose estate is interested in the controversy, the court will cease to have jurisdiction if the interest of the estate ceases, and the cause is dismissed as to the assignee.

Motion to Dismiss for Want of Jurisdiction.

The parties to the original bill in this case were James C. Moore and James E. Yeatman, as assignees in bankruptcy of J. O'Fallon and Samuel Hatch, and George W. Hall, Peleg Hall, and Robert Aull, trustees of Hall & Hall, plaintiffs, and John O'Fallon, James O'Fallon, and Anna M. O'Fallon, defendants. The case was dismissed by a supplemental bill as to the assignees of O'Fallon & Hatch. The other material facts are sufficiently stated in the opinion of the court.

Given Campbell, James Taussig, and George W. Taussig, for plaintiffs.

E. F. Farrish, for defendants.

TREAT, D. J. Many questions are presented worthy of serious discussion, jurisdictional and otherwise. If the court, despite the shifting aspect of the case, retains jurisdiction for the purpose of ascertaining what the present plaintiffs would be, under any circumstances, entitled to as damages for waste, would involve many difficulties. They became purchasers July 17, 1874, and bought the property as it then stood. They certainly cannot go back of the date of the assignment to them of the original mortgage and have the court inquire as to the prior license granted by the mortgagee to clear the land, and of what was done under that license unrevoked subsequent to the assignment. By this it is meant that the assignees would stand in the same position as their assignor, so far as the subsisting mortgage of the realty and the license granted was concerned, but no further. As such assignees they had a demand against James J. O'Fallon, the bankrupt, who was the indorser of the mortgage note, and were compelled to realize on their security, or ascertain its value, before they could prove up against the general estate in bankruptcy of James J.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

O'Fallon for the balance remaining. Having become purchasers of the mortgaged property, thus ascertaining its value, they appear before this court solely in that capacity, if they have now any right to proceed here. As purchasers they acquired the property as it was, stripped by waste if you will, previous to their purchase. They did not thereby acquire the right to damages for previous waste unless it passed by joint sale; for that right belonged solely to the bankrupt's assignee, and would be assets of the bankrupt's estate, or would be so much added to the value of the security. Dates are confused, leaving the facts to be settled as best they may under the evidence. The latest date for cutting timber on the Huskey tract is in July, 1874; but whether such cutting was before or after the plaintiffs became purchasers there is nothing to show with definiteness.

Without going through by way of detailed analysis the large amount of evidence offered, the court holds that the plaintiffs, in the present aspect of the case, could not recover damages for any waste done prior to their purchase, July 17, 1874, and that there is no proof satisfactorily shown of any waste subsequent to that date for which the defendant is responsible.

To make this ruling more intelligible a full history of the case ought to be given: The salient points are that James J. O'Fallon was the mortgagee of the estate of the defendant; that as such mortgagee he licensed his mortgagor to proceed with the improvements of the mortgaged premises, which consisted mostly of wild land; that the mortgagor thereupon cleared many acres, felling timber, etc., and also improving the residence building; that James J. O'Fallon, the mortgagee, to secure some of his partnership indebtedness, assigned the mortgage to the plaintiffs, (partnership creditors;) that the partnership went into bankruptcy, together with James J., the partner; that thereupon, in the course of the administration of the bankrupt estate, it became necessary for the assignees in bankruptcy, and of these plaintiffs, holding the original mortgage, to institute proceedings to prevent waste, whereby the security would otherwise be diminished in value, and the plaintiffs have a large demand against the bankrupt's general estate. The security was sold, and these plaintiffs became the purchasers. What did they buy? The property as it then was, diminished by whatever waste had been previously committed? As purchasers they acquired no right of action as to waste previously committed, unless the same is covered by the sale. If such waste had been committed, whose was the right to recover therefor? If that right belonged to these plaintiffs, as assignees of the

mortgage, they should have enforced the same, and accounted therefor in the settlement of the bankrupt estate. If they did not so account, the assignees in bankruptcy were entitled to the amount, to be divided among the general creditors. Certainly, these plaintiffs, as assignees of a mortgage, could not, on becoming purchasers at the mortgage sale, be entitled to become creditors for the deficiency, and also for waste, in consequence of which they bought the property for a diminished sum. To make this more clear let it be supposed that a stranger, on July 17, 1874, bought the property and received a deed therefor. He bought the property as it then stood, and not a right of action as to antecedent waste. Could he, because he was not only purchaser but mortgage creditor, acquire any rights other than what any other purchaser would secure? If so, to whom belonged the damages for antecedent waste? If to the assignee of the mortgage, was it not his duty to prove the same as an independent demand against the general estate, or, as in this case, for the bankrupts' assignees to recover the same as general assets?

In any view of the case which may be presented it seems that the conclusion announced is the only tenable one.

But there is a motion pending and reserved, viz., to dismiss for want of jurisdiction. Plaintiffs' right to appear in this court depended mainly on the joinder of the assignees in bankruptcy, who were supposed to have some interest in the controversy. When the latter disappeared from the suit, what was the controversy? It was one between the mortgagor and the assignee of the mortgage, who had become purchaser under foreclosure. The bankrupt estate had no longer any interest therein, and consequently this court no jurisdiction. Hence, whether the motion to dismiss for want of jurisdiction obtains, or the court is to pass on the merits, the same result follows. On the merits the plaintiffs cannot prevail; but as the court has no jurisdiction it cannot pass on the merits.

The motion to dismiss will be sustained.

HIBERNIA INS. CO. v. ST. LOUIS & NEW ORLEANS TRANSP. CO.*

(Circuit Court, E. D. Missouri. March 9, 1882.)

1. CORPORATIONS—FRAUDULENT ASSIGNMENT OF ASSETS—SUBROGATION—PLEADINGS—PARTIES.

Where A., an insurance company, brought its bill in equity against B., C., and D., and alleged that B. was a transportation company, and had, by different contracts of affreightment with different shippers, undertaken to transport certain merchandise, insured by A., to a specified point; that said merchandise was shipped at different times on different barges; that the same was damaged or lost through B.'s negligence under different circumstances; that A., as insurer, paid the amount of the respective losses, and became subrogated to the rights of the shippers against B.; that after said cause of action accrued B., fraudulently and without consideration, transferred to C., another corporation, all its assets, and that C. took the same with notice of A.'s demand; and that D. was the president of and principal stockholder in, and caused said transfer to be made; and where the prayer of the bill was for a decree as for a moneyed judgment against the defendants; also to charge the property transferred, as aforesaid, with a lien in A.'s favor thereon,—*held*, (1) that D. was not a proper party; (2) that the bill was not multifarious; (3) that the allegations of the bill were sufficient to hold B. and C. to answer; and (4) that under the facts stated, C. was answerable to A. to the extent of the property received by it from B.

Demurrer to the Bill.

The defendants demurred to the bill in this case upon the following grounds, viz.:

(1) Because it contains no matter of equity whereon this court can ground any decree or give complainant any relief as against defendants. (2) Because said bill does not show any privity between the plaintiff and defendants which would entitle it to call upon these defendants to account to it in this court. (3) Because said bill of complainant is multifarious, in that it unites in the same bill several matters and causes in which none of these defendants have any united or common interest, and in which no two of said defendants have any interest. (4) Because, on the face of said bill, it is apparent that this complainant has no right to institute this suit in this court, or to ask the relief requested.

The averments of the bill are sufficiently set forth in the opinion of the court. The parties defendant are the St. Louis & New Orleans Transportation Company, the Babbage Transportation Company, and Samuel Lowery.

O. B. Sansum and George H. Shields, for plaintiff.

Given Campbell and Thomas J. Portis, for defendants.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

TREAT, D. J. The Babbage Transportation Company, by different contracts of affreightment with different shippers, undertook to transport to New Orleans certain merchandise specified. Said merchandise was shipped at different times on different barges, which were towed by different steamers. It is averred that the same, respectively, was damaged or lost through the negligence of said transportation company, under entirely different circumstances. There is no averment that judgment *in rem* or *in personam* was ever in admiralty or at common law had, but that the plaintiff, as insurer, paid the amount of the respective losses, and, being thereby subrogated to the rights of the respective shippers, can maintain the cause in equity before recovery had on the original demands. The bill avers that, after said cause of action accrued against the Babbage Transportation Company, said company transferred fraudulently to the other defendant company all of its boats, barges, etc., and that Lowery, being president and principal stockholder, caused said transfer to be made. The prayer of the bill is for a decree as for a moneyed judgment against the defendants, also to charge the property transferred as aforesaid with a lien in plaintiff's favor therefor, and for an injunction *pendente lite* against the further sale or transfer of said property.

It is obvious that if this mode of proceeding can be upheld the court will have primarily to ascertain whether the Babbage Company, as owner of the respective barges or steamers, was liable for the alleged losses. In admiralty, if a loss occurred as charged, the shippers had their appropriate remedy *in rem* or *in personam*, with a resultant lien *in rem* on the barges and steamers involved, or, at common law, actions on the different contracts of affreightment. The rights of the shippers would pass to the insurers by subrogation. No such legal proceedings, however, have been had. The plaintiff is merely a creditor at large as to two separate demands, requiring distinct trials. Of course, two such demands could not be united in an action *in rem* in admiralty, because the transactions and the vessels were different. Whether they could be united *in personam* it is not necessary to discuss, but in equity such joinders are frequent. The right to join the two demands must rest, then, upon the allegations as to the fraudulent transfers, the same having been made with knowledge of the plaintiff's claims, and impliedly to defeat the same.

By what rule was that property or the vendee thereof charged with the unascertained obligations of the vendor? It must be, if at all,

because said transfer was a mere fraudulent scheme to deprive the plaintiff of his rights against said property. But he had no distinctive right against any other than the guilty *res* respectively; certainly no lien upon *all* the property of the owners prior to a judgment *in personam* in admiralty, or upon execution levied subsequent to judgment at common law. It is true that under exceptional circumstances courts of equity have lent their aid to creditors at large, and generally when the property sought to be charged was already in the custody of the court by force of a trust, receivership, etc.

The case of *Garrison v. Memphis Ins. Co.* 19 How. 312, can hardly be considered as fully sustaining the plaintiff's proposition, although, from the imperfect statement of that case, it would seem to be held that because an insurer is in equity subrogated to the rights of the insured, he may before judgment at law proceed to enforce his demand against the owners of a vessel. The cases cited in that opinion do not go to the length here claimed; for the court only insists upon the rule whereby the insurer, subrogated to the rights of the insured, may enforce the lien on a judgment recovered by the insured, and "may apply to equity whenever an impediment exists to the exercise of his legal remedy in the name of the assured." To those familiar with the common-law practice then prevailing to a large extent, the true meaning of that expression by the court is clear. In that case there were 11 contracts of affreightment dependent on the construction each was to receive—the disaster being one and the same—and, to avoid multiplicity of suits, embraced in one bill.

In *Case v. Beauregard*, 99 U. S. 119; S. C. 101 U. S. 688, a fuller exposition of equitable principles is given. The same case was twice before the United States supreme court, substantially, and the views expressed in 101 U. S. 688, are especially instructive. The first bill was dismissed because, as the court says, "it was not averred that judgment at law had ever been recovered against the partnership for the debt, and that an execution had been issued thereon and returned fruitless." It then proceeds to state under what circumstances a creditor may, without judgment and execution previously had, pursue his demand in equity. Taking the most liberal of the rules stated in that case, as exceptions to the general proposition, the case before the court will not fall strictly within any of them; for each must be considered in the light of the equitable circumstances upon which it depends.

It must be admitted that some of the views expressed in that opinion go very far towards sustaining the plaintiff's proposition, yet cannot be held to go expressly to the extent here claimed, as covering claims at large not dependent on the same testimony or transactions. The plaintiff's demands by subrogation are for two distinct causes of action against the Babbage Transportation Company. It is charged that Lowery was president and principal stockholder of said company. As such officer and stockholder no cause of action existed against him personally. Why, then, should he be made a party defendant to this suit? It is said that by force of the Missouri statute he could in given contingencies be compelled to respond, to a certain extent at least, to the demands against the corporation. But is this a proceeding to enforce a supposed liability against him as a stockholder? and, if so, why is not the same done pursuant to the Missouri statute, so that he may be compelled to respond individually to plaintiff's demand? But the bill is based on another theory to which he is not a necessary or proper party; otherwise a decree would have to be rendered against him individually. He is not charged with insolvency; nor are any of the facts averred whereby he would become personally liable for the debts of the Babbage Transportation Company. If he were, the proceedings at law against him would be full and adequate under the Missouri statute. The extended theory of the bill is that there are outstanding demands against the Babbage Transportation Company not reduced to judgment nor supported by a lien; that in that condition of affairs that company transferred all its property without consideration, and therefore fraudulently, as against existing creditors, to the other corporation, with full knowledge on the part of the latter that there were such outstanding demands; that the only means of enforcing those demands is to compel the latter company to hold the property thus received by it subject to such demands when established. The peculiarities of the law concerning the formation and dissolution of corporations under the Missouri statutes provoked a sharp comment from Justice Miller a few years ago, so far as they were designed to affect proceedings in admiralty. His remarks might have been properly extended to other proceedings. The case before the court is illustrative. A corporation having incurred liabilities, is dissolved, practically, by transferring all its property to another corporation, formed possibly for the very purpose of leaving the creditors of the former (creditors at large) without any adequate means of realizing their just dues. There is too much of this,

as judicial experience has shown. The change of organization is too often a mere change of name, designed solely to defeat the rights of creditors. The corporation has one name to-day, and to escape its liabilities goes through the form of a new organization and takes a new corporate name, with a transfer of all the assets of the old corporation. Should that contrivance succeed? Should not a court of equity hold the new answerable for the old to the extent of assets received? Such is the purpose of this bill. Mr. Lowery is an unnecessary party, but the allegations are sufficient to hold both of the corporations to answer. If the new corporation knew, as charged, that the demands against the old were outstanding, and with that knowledge received all the property of the old corporation without consideration, why should it not be held to have acquired that property *cum onere*? Will not a court of equity cut through such formal contrivances, so as to prevent the success of a scheme which operates a fraud, whether so intended or not? Such seems to be the scope of the decisions by the United States supreme court.

There may be many difficulties connected with the transfer of personal property, if such a view is to obtain, which difficulties, however, do not arise in this case. Here it is charged that the new corporation took all the property of the old without consideration, charged with full notice of plaintiff's demands, and therefore, as to this plaintiff, fraudulently. It may be that serious embarrassments will ensue, pending the litigation, if the *lis pendens* is to hang over the new corporation concerning its rights in the transferred property. Of course, it is answerable to plaintiff's demands only to the extent of the property received; and if any serious detriment as to the use or disposal of the same should arise, the court is open for such orders as may preserve the rights of the parties pending the litigation.

The attention of the court has been called to the Missouri statute, whose terms and procedure, it is considered, are inapplicable to the matters under consideration. The averments of the bill are sufficient, so far as the two corporations are concerned, but not sufficient as to Lowery. If any cause of action against him, personally, should arise, either through his connection with the respective corporations or otherwise, the plaintiff can then pursue whatever course at law or in equity may be proper; but such possibilities cannot justify the plaintiff in making him, or any other stockholder, a party defendant to the present proceeding.

The court decides that said Lowery is improperly joined as a defendant; and the demurrer will, to that extent, be sustained, and

overruled in all other respects. The plaintiff can dismiss as to Lowery; and, on doing so, the remaining defendants will have leave to answer within 15 days.

The doctrine as to multifariousness in this class of cases is well considered in *Hayes v. Dayton*, 18 Blatchf. 420.

HANNON, Executor, v. SOMMER.

(Circuit Court, D. Kansas. June, 1881.)

1. HOMESTEAD—STATUTORY CONSTRUCTION.

The constitution and statutes of Kansas provide that a homestead to the extent of 160 acres of farming land, occupied as a residence by the family of the owner, together with all improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists. *Held*, that the latter clause necessarily implies that the homestead may be alienated by its owner if the relation of husband and wife does not exist.

2. POWER OF HUSBAND TO MORTGAGE HOMESTEAD AFTER DEATH OF WIFE.

The husband, after death of the wife, under the laws of Kansas, may alienate his interest in the homestead by deed absolute, or may mortgage the same subject to the right of occupancy of the premises as a homestead by the minor children, whose rights under the homestead law are not affected by the mortgage.

3. MORTGAGE—VALID LIEN.

Such a mortgage is not void from want of power in the husband to execute it, but is a valid lien on his undivided half, subject to the right of occupancy and use of the whole by the heirs.

4. FORECLOSURE—DECREE.

In a suit for foreclosure of a mortgage of the homestead property made by a husband after the death of his wife, *held*, that plaintiff is entitled to a decree of foreclosure upon the interest of the respondent, subject to the homestead rights of the heirs, though the husband remains unmarried.

In Equity. Bill to foreclose mortgage.

The property mortgaged, 160 acres of farming land, was occupied as a homestead by the surviving husband and his minor children, his wife having died about a year before the date of the mortgage. The minor children were not made parties to the suit. The case was heard at the June term of 1879, and a reargument was directed on the questions: Is the mortgage void because the husband had no power to execute it? and, if so, is the plaintiff entitled to a decree of foreclosure while the husband remains unmarried and the children are minors?

On Reargument.

Mahan & Burton, for complainant.

Hoffman & Pierce, for respondent.

McCARY, C. J. The constitution of the state of Kansas provides as follows, (article 15, § 9:)

"A homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city occupied as residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by consent of both husband and wife."

Substantially the same provision is embodied in the Statutes of Kansas, c. 38, § 1.

It is, of course, very clear that, under these provisions, the homestead cannot be alienated without the joint consent of husband and wife when that relation exists, and a mortgage executed by the one without the consent of the other would be void; but the question here is whether a mortgage upon such homestead is equally void if executed by the husband alone after the death of the wife. That the minor children have a right to the use and occupancy of the homestead, and that this right cannot be interfered with by the mortgagee, or any one claiming under him, whether through a foreclosure sale or otherwise, seems to be conceded. The only question is as to the right of complainant to a decree for the sale of the undivided half of the premises, subject to the right of the minor heirs to the use and occupancy of the premises, whatever the extent of that right may be.

It is the settled law of Kansas that the homestead may be alienated by the joint deed of husband and wife; and also that, in the case of the death of either, the survivor may subsequently alienate his or her interest, subject to the right of occupancy of the premises as a homestead by any members of the family entitled to such occupancy, and not joining in the conveyance. *Dayton v. Donart*, 22 Kan. 256; *Gatton v. Tolley*, Id. 678.

The respondent, therefore, might have sold, by deed absolute and unconditional, all his interest in the premises at the time he executed the mortgage, and the sale would have been valid as against all the world except the children, whose right under the homestead law would have remained the same precisely as if no sale had been made. It

is well settled as a general rule that any interest in lands which is the subject of contract or sale may be mortgaged. 2 Story, Eq. Jur. § 1021; *Miller v. Lepton*, 6 Blackf. (Ind.) 238.

But it is insisted by counsel for respondent that the constitutional provision above quoted constitutes an exception to the general doctrine on this subject, because it declares that the homestead "occupied as a residence by the family of the owner, together with all of the improvements on the same, shall be exempted from forced sale under any process of law," except for taxes, for purchase money, or by virtue of a lien given by the consent of both husband and wife. This clause must be construed in connection with the remainder of the sentence, which declares that the homestead "shall not be alienated without the joint consent of both husband and wife when that relation exists." This provision necessarily implies that the homestead may be alienated by its owner if the relation of husband and wife does not exist; and if it can be alienated absolutely, it can be mortgaged.

If it can be mortgaged, the mortgage can be foreclosed, and the equity of the mortgagor, whatever it is, may be sold. The constitutional provision was intended to protect the right of the wife and children in the homestead by exempting it from sale for debt, and requiring a sale or mortgage to be made by both husband and wife when that relation exists. It did not provide for the case of a homestead held by a husband after the wife's death. The words "forced sale," employed in the above provision of the constitution, should, we think, be held to mean sales upon execution or other process for the collection of the ordinary debts of the owner, and not to a sale made for the enforcement of a mortgage which the owner had the right to execute, and which the holder has the right to foreclose. This construction preserves all the homestead rights of the heirs. It would be no advantage to them to require complainant to wait for his decree until their right of occupancy and use has ceased; nor can it do any harm to sell at once the interest of the mortgagor, subject to their rights. The purpose of the constitutional provision—to protect the homestead rights of the family—is accomplished by such a decree.

Our conclusions are:

(1) That the mortgage is not void because the husband had no power to execute it. (2) That it is a valid lien on his undivided half, subject to the right of occupancy and use of the whole by the heirs. (3) That complainant is entitled to a decree of foreclosure upon the interest of the respondent, sub-

ject to the homestead rights of the heirs, whatever those rights may be; and we do not undertake to define or limit them. That can be properly done only in a proceeding to which they are parties.

Decree accordingly.

FOSTER, D. J., concurs.

MERCANTILE TRUST CO. v. PORTLAND & OGDENSBURG R. CO.

(Circuit Court, D. New Hampshire. February 21, 1882.)

1. FORECLOSURE—NECESSARY PARTIES.

In a suit by the bondholders of a railroad company holding bonds secured by a first mortgage on a part of the road and a second mortgage on the rest of the road, and praying that an account be taken of the earnings received from the different parts of the road, and for payment of the amount due to the plaintiff, or, in default, for a foreclosure of the mortgage; and asking that a receiver be appointed, and for other relief,—the trustees of the second mortgage, under which the plaintiff claims, are necessary parties.

2. NON-RESIDENT PARTIES—APPEARANCE, HOW SECURED.

If they are residents of another state, the statute of 1875, c. 137, § 8, provides for summoning all such absent parties, where there is property within the jurisdiction upon which a lien is claimed.

3. MORTGAGE—PROVISIONS OF STATUTE PART OF THE CONTRACT.

Where a state statute provides for the rights and duties of trustees of a corporation, it relieves the parties from providing therefor in each mortgage executed under the laws of such state.

J. W. Fellows, E. J. Phelps, and Noble & Smith, for complainant.
Mr. Haskell, for defendant Anderson.

LOWELL, C. J. This case has been argued upon demurrer to the bill. The facts alleged are that the Portland & Ogdensburg Railroad Company exists by the authority of the states of Maine and New Hampshire; that in 1870 it mortgaged that part of its line which extends from Portland, in Maine, to Bartlett, in New Hampshire, to secure bonds for \$800,000; that in 1871 it mortgaged the whole line, from Portland to the western line of New Hampshire, together with its rolling stock owned or which might thereafter be acquired, to G. T. Emery and two others, as trustees, to secure bonds for \$3,000,000, and issued the bonds to the amount of \$1,900,000, of which the plaintiff holds \$80,000, and sues for itself and others in like interest who may choose to come in and contribute to the expenses. This mortgage is the first, from Bartlett to the west-

ern line of the state, and the second, from Portland to Bartlett. The bill goes on to allege that interest has been paid regularly on the debt secured by the first mortgage, but that the payments have been made, in part, out of earnings which should have been devoted to the payment of the debt secured by the second mortgage, and no interest has been paid on that debt since May, 1876. It prays that an account may be taken of the earnings received for the different parts of the road; for payment of the amount due the plaintiff, or, in default, for a foreclosure; for a receiver, and for other relief.

I consider that cause of demurrer to be well assigned which objects that the trustees of the second mortgage under which the plaintiff claims have not been made parties. They may have good reasons to give why a receiver should not be appointed; to show why they have not taken possession of the road, if they have not; to see that all bondholders are protected, etc. The reasons for their being parties are many and familiar. It seems that they live in Maine; but the statute of 1875, c. 137, § 8, provides for summoning into the circuit court all such absent parties where there is property within the jurisdiction upon which a lien is claimed. It is argued that Judge Wheeler decided, in *Brooks v. Vermont C. R. Co.* 14 Blatchf. 463, that the bondholder could proceed without the trustees; but what he said was (page 466) that the bondholders could proceed, whether the trustees would or not, by making them defendants.

In *Mercantile Trust Co. v. Lamoille Valley R. Co.* 16 Blatchf. 324, the trustees were parties defendant, and the court merely decided, so far as the present case is concerned, that the bill need not allege a request to the trustees to foreclose, and their refusal.

Again, it is said that the mortgage imposes no duties upon the trustees, and invests them with no rights, but gives them merely the dry, legal title. But the bill alleges that the mortgage was made by virtue of the laws of Maine and New Hampshire, and the laws of Maine have a chapter devoted to this subject, which relieves the parties from the necessity of providing therefor in each mortgage.

The demurrer is sustained. The plaintiffs may amend within 60 days.

NOTE. The court may, in an order for appearance of a non-resident defendant, fix any day certain for his appearance, and is not limited to the usual rule-days in equity. *Forsyth v. Pierson*, 9 FED. REP. 801. Such order may be made upon a proper showing by affidavit alone, and a marshal's return "not found" in the district is not a condition precedent to the making of it.

Id. Service of such order by the marshal or his deputy of the district whereof the non-resident defendant is an inhabitant, or where he is found, and the return thereof in the usual form or by affidavit, are sufficient. Id. See, as to service on non-resident corporation, *Parrott v. Alabama Gold Life Ins. Co.* 5 FED. REP. 391; *Pennoyer v. Neff*, 95 U. S. 714.—[ED.]

MATTHEWS v. PUFFER and others.*

(Circuit Court, S. D. New York. January 18, 1882.)

1. PRACTICE—SERVICE OF SUBPENA—PRIVILEGED ATTENDANCE.

Where a motion to set aside the service of a subpoena, on the ground of privileged attendance within the district, had been denied on the ground that the defendant had failed to show that he was a non-resident of the state, *held*, on a renewal of such motion without leave, that the fact of non-residence should have been proven on the former motion. It is not a newly-discovered fact.

2. SAME—SAME—WAIVER OF PRIVILEGE.

An objection to the service of a subpoena as made while defendant was protected by a privilege, may be waived by not being promptly availed of.

In Equity. Motion to set aside service of subpoena.

A. v. Briesen, for plaintiff.

E. C. Webb, for defendant.

BLATCHFORD, C. J. The defendant Alvin D. Puffer heretofore made a motion to this court, founded on affidavits, to set aside the service made on him of the subpoena to appear and answer herein. The suit is one for the infringement of letters patent. The motion was opposed and denied by an order made December 30, 1881. The reasons set out in the motion papers, as grounds for the motion, were that the service was made upon the said defendant while he was attending the examination of witnesses in the office of the counsel for the plaintiff herein, in the city of New York, in a cause of interference then pending between him and the plaintiff before the United States patent-office, and when he was lawfully attending at said office "in his right as a party to said interference cause." The moving affidavits did not show where the defendant resided, or where he carried on business; but merely that he "went to New York" to attend such examination, not stating from what place he went. The motion was made upon the bill as a part of the moving papers. The bill speaks

*Reported by S. Nelson White, Esq., of the New York bar.

of the defendants as "doing business" at Boston and New York, and as being citizens of the United States.

In opposition to the motion it was shown by affidavits on the part of the plaintiff that the defendant served had a place of business in the city of New York, and one also in Boston. In regard to him the plaintiff said, in an affidavit: "His place of residence in New York is not known to me, and I have been unable to ascertain it." The defendant, after hearing the affidavits in opposition to the motion, chose to submit it for decision, and did not ask leave to withdraw it and renew it on further papers, or to put in further papers. The court, in denying the motion, said: "It does not anywhere appear that A. D. Puffer is a citizen of Massachusetts, or is not a citizen of New York, or does not reside in New York. The bill alleges that he does business at New York and is a citizen of the United States. It is shown that he has a place of business in New York city. The motion is denied."

The defendant now, without leave, renews the motion on papers showing that at the time of the service he was a citizen and a resident of the state of Massachusetts. This was a fact which the defendant was called upon to show on the first motion. It is not a newly-discovered fact. It was involved in and pertinent to the first motion. It was called to the attention of the defendant by the opposing papers, and yet the judgment of the court was invoked on the case. The court had jurisdiction of the subject-matter of the suit. The service of the subpoena was made on the defendant personally in this district. The objection to the service, as made while the defendant was protected by a privilege, was one which the defendant could waive, and one which he might waive by not making it when he ought to make it, or by not making it in a proper way, as well as by not making it at all. It is one of those irregularities which must be promptly availed of. In the present case it must be held that the defendant lost his right to show that he was a citizen and resident of Massachusetts, and the motion to set aside the service of the subpoena is denied.

NOTE. A party going into another state as a witness or as a party under process of a court, is exempt from process in such state while necessarily attending there in respect to such trial. *Brooks v. Farwell*, 4 FED. REP. 167; citing *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *The Juneau Bank v. McSpedan*, 5 Biss. 64; and see *In re Healy*, 24 Alb. Law J. 529. So a party while in another state, attending a regular examination of witnesses, is privileged. *Plimpton v. Winslow*, 9 FED. REP. 365.—[ED.]

BUERK v. IMHAEUSER and another.*

(*Circuit Court, S. D. New York. February 2, 1882.*)

1. EQUITY PRACTICE—INTERROGATORIES IN BILL—SUFFICIENCY OF ANSWER.

Under the rules in equity defendants are required to answer specifically only such interrogatories in the bill as by the note thereunder written they are required to answer; otherwise they need answer only as specifically as the stating part of the bill charges.

In Equity. On exceptions to answer.

William C. Hauff, for plaintiff.

Arthur v. Briesen, for defendants.

WHEELER, D. J. This cause has now been heard on exceptions to the answer for insufficiency. The bill states the recovery of judgments by decree against the defendants for the payment of money; that execution cannot be satisfied for want of property to be found; that the defendants have or have had property, without specifying any in particular; and prays a discovery of their property in hand or held in trust for them. The interrogatories make more specific inquiries. The answer denies generally that the defendant answering has any property in his hands, or that any is held in trust for him, or that he has conveyed away any since the decree, at all, or before, in view of it, to defeat it. The rules in equity require defendants to answer only such interrogatories as they are specifically required by note to answer. This bill, accordingly, required the defendants to answer such interrogatories as by the note thereunder written they should be required to answer. There is no note thereunder written; therefore there were no interrogatories to be specifically answered. They were only required to answer the stating part of the bill. This the defendant answering has done, as specifically as he is by the bill charged. No ground is known for making a defendant give a particular account of all the property he has ever had, or deny specifically having had particular property, upon such general charge as to having had property before, which cannot be found now to satisfy judgments. At least, the particular property sought to be reached should be pointed out before anything more than a general answer should be compelled.

Exceptions overruled

See *Chicago, St. L. & N. O. R. Co. v. Macomb*, 2 FED. REP. 18.

*Reported by S. Nelson White, Esq., of the New York bar.

TUFTS v. MATTHEWS and another.

(Circuit Court, D. Rhode Island. March 4, 1882.)

1. DECEIT—RIGHT OF ACTION NOT ASSIGNABLE.

The right of action for damages for a deceit is not assignable, and does not pass to the assignee of the bankrupt

2. ASSIGNMENT.

As a rule, only such actions are assignable as survive the death of a person, and would go to his executor or administrator. Where there is nothing, such as would survive the death of a person, there is nothing capable of being transferred.

3. CASE STATED—RIGHT OF ACTION.

Where the assignee of the purchaser from the assignees of a bankrupt of all the assets of the bankrupt remaining in their hands, brings an action for pecuniary damages arising from alleged false representations made to the bankrupt and to his assigns through which certain first-mortgage railway bonds deposited as security for certain notes of one of the defendants were given up, *held*, that whatever right of action the bankrupt may have had, this *chose in action* did not pass to his assignees, and therefore no right of action passed to the plaintiff.

At Law.

Charles M. Barnes and Hyde, Dickerson & Howe, for plaintiff.

James Tellinghast, for defendants.

COLT, D. J. This is an action for deceit. The defendants have demurred to the declaration. The main question raised by the demurrer is whether an action of deceit is assignable. The facts alleged, so far as it is found necessary to state them, are as follows:

One Nathan Matthews, of Boston, was adjudicated a bankrupt upon petition filed August 30, 1878, and assignees were duly appointed. On December 19, 1879, the assignees sold all the assets of the bankrupt remaining in their hands, and all their rights of action against the defendants, to Benjamin F. Brooks; and on January 22, 1880, Edwin Tufts, the plaintiff, became the purchaser from Brooks. Among the assets of the bankrupt were claims to a large amount upon promissory notes made, in 1875, by Edward Matthews, of New York, one of the defendants. In February, 1877, an agreement was entered into by which Nathan Matthews was to surrender a large part of these notes, and discontinue proceedings in bankruptcy already commenced against Edward Matthews, in New York, upon certain terms, which, however, were never carried out by Edward Matthews, though the proceedings in bankruptcy against him were withdrawn. At the same time, as a part of this agreement, there were deposited, as security for the payment of Edward's notes, until he should fulfil the terms of the agreement, and make the payments called for under it, with William H. Williams, of New York, 250 of the first-mortgage bonds of the Carolina Central Railway, each of the par value of \$1,000. It is

alleged that representations were made by the defendants Edward Matthews and Virginia B. Matthews, at the time the bonds were deposited, that Edward was the owner, but that afterwards, and prior to October 1, 1879, false and fraudulent representations were made by them to Nathan Matthews, his assignees, and to Williams, that Virginia, and not Nathan, was the owner; and that, being deceived by these false statements, and by other false representations made by Edward respecting the value of the coupons due on said bonds, Nathan, with the assent of his assignees and Williams, on October 1, 1879, entered into an agreement with Edward whereby the bonds were surrendered to Virginia on the payment of a small part of their value. In consequence of this, Edward's notes were left unpaid, and the assignees greatly damaged. Tufts, as the purchaser from Brooks of all rights of action belonging to the assignees, now brings this suit for deceit in the matter of the surrender of these bonds, alleging damages to the amount of \$300,000.

We do not see, under the authorities, how an action of this character can be transferred by assignment; but, even if transferable, we very much doubt if the plaintiff could bring suit in his own name. It has been held that where the laws of a state do not permit the assignee of a *chose in action* to sue in his own name, a person who purchases such *chose in action* from the assignee in bankruptcy cannot maintain an action thereon in his own name; and, further, that the *lex fori* governs the form of remedy. There the contract was made in New York, and suit was brought in Massachusetts. *Leach v. Greene*, 12 N. B. R. 376. But neither the common law nor the statutes of Rhode Island nor the bankrupt act seem to warrant us in holding this action assignable. As a rule, only such actions are assignable as survive the death of a person, and would go to his executor or administrator. Where there is nothing such as would survive the death of a person, there is nothing capable of being transferred. *Comegys v. Vasse*, 1 Pet. 193, 213; *Dillard v. Collins*, 25 Gratt. 343.

At common law, personal actions died with the person,—*actio personalis moritur cum persona*; and this has been construed to mean all torts where the action is in form *ex delicto* for the recovery of damages, and the plea not guilty. 1 Saund. 216a, note 1; *Henshaw v. Miller*, 17 How. 212, 219.

While the statute of 4 Edw. III. c. 7, by a liberal construction enlarged the number of actions which survived, it was never held to extend to actions of assault and battery, false imprisonment, slander, deceit, and the like. Williams, Ex'rs, (6th. Am. Ed.) 870, (793.)

The number of actions which survive have been greatly increased by statute in most of the states. Under statutes quite similar to those

of Rhode Island, which provide for the survival of actions for damages to the person, or real or personal estate, it has been decided that actions for deceit or fraud, for pecuniary damages, will not lie. The damage done must be to some specific property of which the person is the owner. It is not sufficient if the damage arises incidentally or collaterally. False representations by which one is induced to part with property do not appear to come within the provisions of the statute. *Read v. Hatch*, 19 Pick. 47; *Cutting v. Tower*, 14 Gray, 183; *U. S. v. Daniel*, 6 How. 11; *Henshaw v. Miller*, 17 How. 212.

Section 5046 of the bankrupt act describes what property and rights pass to the assignee. The construction put upon the words "choses in action," there mentioned, excludes actions for personal tort such as the fraudulent and deceitful recommendation of a person as worthy of credit whereby goods were obtained, abuse of the garnishee process which injured the bankrupt's business, assault and battery, slander, and the like. *In re Crockett*, 2 N. B. R. 208; *Noonan v. Orton*, 12 N. B. R. 405; *Dillard v. Collins*, 25 Gratt. 343.

The action before us is one for pecuniary damages arising from alleged false representations made to the bankrupt and to his assignees, through which the bonds deposited as security for the payment of the notes of one of the defendants were given up. So far as it may be contended that the plaintiff has succeeded to any right of action the bankrupt may have had, it is clear, we think, that this chose in action did not pass to the assignees, and therefore did not pass to him; and, so far as it may be claimed that this is a right of action that accrued to the assignee personally, we fail to discover any authority in the bankrupt act, or otherwise, for them to assign an action of this character. The right to complain of a fraud is not a merchantable commodity, say the court in *De Houghton v. Money*, L. R. 2 Ch. App. 164.

Here such right has not only been sold once, but the first purchaser sells it to a second, who then brings suit in his own name.

Demurrer sustained.

See the right of action for fraud is not assignable. *Dickinson v. Seaver*, 44 Mich. 624; S. C. 7 N. W. Rep. 182.

UNITED STATES *v.* CENTRAL NATIONAL BANK.

(District Court, S. D. New York. February 3, 1882.)

1. BANKS—STATE TAXATION—RETURNS, WHAT DEDUCTIONS ALLOWED—"PROFITS" DEFINED.

In ascertaining the "amount of profits which have accrued or been earned and received" by a bank, for which it was required to make returns by section 121 of the act of June 30, 1864, (13 St. at Large, 284,) embezzlements during the period covered by the returns may be deducted. By "profits" is meant net profits after deducting expenses and losses from whatever sources connected with the business.

2. RETURNS OF PROFITS—DEDUCTION OF LOSSES BY EMBEZZLEMENT.

Where, for the years 1866, 1867, and 1868, the defendant, in making its returns, deducted the amounts paid by it for state taxes upon the value of the shares of capital stock, and required by the state law to be paid "out of its funds," and suit being now brought for a duty of 5 per cent. on the amount so paid by the bank on account of the state tax, on the ground that it was unlawfully deducted from the returns made, and it appeared that the amount of losses by embezzlement suffered by the bank during each year was greater than the amount so paid for taxes and deducted from the returns, and that such losses had not been deducted, because not discovered by the bank till after the returns made and its duties paid thereon, *held*, that its returns being in fact fully equal to all the bank's profit for those years, no further duty could be recovered.

3. JUDGMENT ON DEMURRER—GOING BACK TO FIRST FAULT.

Upon demurrer the whole record is presented, and judgment goes against the party in whose pleading there is found the first substantial fault.

4. PLEADING—INSUFFICIENT ALLEGATIONS IN COMPLAINT.

Where the complaint claimed duty for alleged insufficient returns for the year 1870, under section 121 above referred to, but did not state that the defendant had "neglected to or omitted to make a return of dividends or additions to its surplus or contingent funds as often as once in six months," and, upon an answer claiming the right to deduct the state tax, as above stated, the plaintiff demurred to the defence for insufficiency in law, *held*, without passing upon this defence, that the complaint was insufficient, and judgment should be ordered for the defendant unless plaintiff amended as allowed.

Demurrer to an Answer.

S. L. Woodford, Dist. Atty., and *E. B. Hill*, Asst., for the United States.

Martin & Smith, for defendant.

BROWN, D. J. This action was commenced on July 22, 1881, to recover the sum of \$12,456.94 principal, besides interest, for arrears of income tax alleged to be due from the defendant for the years 1866, 1867, 1868, and 1870, under sections 120 and 121 of the revenue act passed June 30, 1864, (13 St. at Large, c. 173, p. 283.)

The complaint alleges that in 1866 the defendant made and realized in its business, as a bank, certain profits, to-wit, \$56,555.69, whereof no return was ever made to the assessor; that said profits were liable to a tax of 5 per centum, none of which has ever been paid. Similar averments are made in reference to the years 1867, 1868, and 1870.

Besides certain denials, the answer sets forth two separate defences:

First. That by the law of the state of New York the defendant was required to retain from the dividends paid to its stockholders the amount of the municipal tax levied by the state against the stockholders upon the value of their shares of the capital stock, and that the defendant was also required by the state law to pay to the state officers, out of its funds, the amount of taxes thus levied upon the par value of the stock, and to deduct said amount ratably from dividends to be paid by the defendant to its stockholders; that, in accordance with the state law, the defendant did so retain and pay to the proper state authorities the state taxes so levied for that year upon the capital stock of its stockholders, amounting to the said sum of \$56,555.69, and its returns to the assessor of the district deducted the amount of taxes so paid, as it claims to have the right under the law to do; and that it paid the duty upon such returns, deducting such state taxes. *Second,* that in 1866 defendant made returns of its profits for that year to the amount of \$478,947.36, and paid to the collector the duty upon that amount; that in July, 1869, defendant discovered certain losses by embezzlement during the years 1866, 1867, and 1868, which had been previously concealed and unknown to it; that the amount of such losses during 1866 was at least equal to the amount of the state tax which had been deducted from the returns of that year, so that, aside from the deduction of the state tax, the amount of its returns to the assessor was fully equal to all its profits for that year; and that, in fact, the duty paid was greatly in excess of that to which it was liable under the act of congress.

The same defences are made to the duties claimed for the years 1867 and 1868. To the claim for the year 1870 the second defence does not apply, but only the first. The plaintiff demurs to each of these defences as insufficient in law.

In behalf of the United States it is claimed that the losses sustained by the bank through embezzlements should not be deducted from its returns; that it must pay taxes upon all its profits earned, and that it is immaterial what becomes of these profits after they have been made, whether lost by embezzlement or otherwise; that it is only legitimate expenses which can be deducted from the profits in making returns to the assessor. No authorities are cited for such a construction, and it seems to me altogether unreasonable. Section

121 provides that "any bank which shall neglect or omit to make a return of dividends or additions to its surplus or contingent funds as often as once in six months, shall make a list or return in duplicate, under oath, to the assessor of the amount of profits which have accrued or been earned and received by such bank during the six months preceding." In ascertaining the "amount of profits which have accrued or been earned or received," every loss which has occurred in its legitimate business should be taken into account. A loss through the crime of one of its officers by defalcation or embezzlement is as much a loss incident to its business as a loss through the robbery of its funds by some person not connected with the bank, or a loss through forged checks or altered bonds, or through bad debts, or a destruction of its property. It cannot be supposed that the term "profits," in section 121, just quoted, means gross receipts on the profit side of its ledger without deductions for expenses in carrying on the business, and losses of whatever nature to which it is exposed in the legitimate prosecution of its business. By "profits" is meant its net profits after all such losses and expenses are deducted. Had its losses by embezzlement been known to the bank at the time of its returns in 1866, they might, therefore, have been properly deducted from the returns for that year. They were not so deducted, and they equal the full amount alleged in the complaint not to have been returned, which it appears was deducted by the bank on account of the state tax which it had paid on account of the stockholders. Even, therefore, if the bank had no right to deduct the state tax which it had paid, it would still be true, as alleged in the second defence, that the bank had made full return of all its profits for that year as required by section 121. This defence of the answer is, therefore, held good; and it applies to the years 1866, 1867, and 1868 as a complete defence to the full amount claimed.

As regards the amount claimed for the year 1870, the only defence demurred to relates to the deduction for the state tax. The answer is not clear in its statements regarding the mode in which the state tax was paid, whether "out of its funds" generally, or out of dividends previously declared; nor does it aver with any clearness or certainty whether any dividends at all were declared, although that fact is rendered extremely probable from other facts stated, and has been assumed by both sides as a fact in their briefs. But assuming that to be the fact, the only cause of action which could arise under the law would be under section 120 for a duty on "dividends" or "additions to surplus or contingent funds." That section and section

121 are mutually exclusive. No case can arise under section 121 unless the bank "shall neglect or omit to make dividends or additions to its surplus or contingent funds." The duty imposed by section 121 on "the amount of profits which have accrued or been earned and received by the bank," in case of failure to declare dividends or additions to its surplus or contingent funds, does not appear to be necessarily the same as might be imposed under section 120 upon such dividends or additions, if made.

The present complaint contains no averments sufficient to present a case under section 120. The construction of the language of this section, in reference to the right to deduct the state tax, and the bearings of sections 116 and 117, which are *in pari materia* upon the same question, cannot, therefore, be here properly considered.

On the other hand, it would be useless to consider the question under section 121 alone, when both parties assume the facts to put the case under section 120. The complaint, moreover, is defective under section 121, because it contains no averment that the defendant had "neglected or omitted to make any dividends or additions to its surplus or contingent funds." The complaint is not sufficient, therefore, under either section.

It is an ancient rule in pleading that upon demurrer the whole record is presented, and judgment goes against the party who commits the first substantial fault. *Cooke v. Graham*, 3 Cranch, 229; *Sprigg v. Bank of Mt. Pleasant*, 10 Pet. 264; 1 Saund. 119, note 7; 285, note 5; 1 Chit. Pl. 668. The same rule is still applicable under the Code. *People v. Booth*, 32 N. Y. 397.

The second defence demurred to is, therefore, held sufficient in law as regards the claims made for 1866, 1867, and 1868, and judgment should be entered for the defendant for the insufficiency of the complaint, unless the plaintiff shall amend within 20 days as to the claim for the year 1870, in which case the answer already put in may, if desired, stand as an answer to the amended complaint as respects that claim.

See *Nat. Albany Exchange Bank. v. Hills*, 5 FED. REP. 248.

UNITED STATES *v.* ODENEAL.*(Circuit Court, D. Oregon. February 14, 1882.)*

1. ADVERTISING FOR SUPPLIES BY SUPERINTENDENT OF INDIAN AFFAIRS — PAYMENT FOR.

The defendant, as superintendent of Indian affairs, published advertisements in two newspapers inviting proposals for supplies, upon the authority of a general order to that effect, addressed to his predecessor in office by the commissioner of Indian affairs, in which it was stated that the order was made by the direction of the secretary of the interior, and attached copies of said order to the bills for publishing such advertisements. *Held*, that the publication of such advertisements was authorized by the secretary of the interior within the meaning of section 3828 of the Revised Statutes, and that the payment thereof was a lawful expenditure of the public money entrusted to the superintendent, and ought to be allowed in his accounts.

Action on Official Bond.

Rufus Mallory, for plaintiff.

The defendant *in propria persona*.

DEADY, D. J. On March 12, 1872, the defendant, as superintendent of Indian affairs for Oregon, executed a bond to the plaintiff, in the penal sum of \$100,000, conditioned that he would "faithfully expend" and "honestly account" for all public moneys that might come into his hands as such officer. In the first quarter of the year 1873 the defendant, acting under this bond, paid out of the public moneys in his hands to C. P. Crandall, publisher of the *Oregon Statesman*, for advertising for bids for Indian supplies, \$61.36, and the *Oregonian* Publishing Company, the sum of \$57.51, for a like service. In the examination of his accounts these items were disallowed by the second auditor, with the approbation of the second comptroller, upon the ground that "no written authority of the honorable secretary of the interior is presented to comply with section 3828 of the Revised Statutes." Subsequently this action was brought to recover these sums—\$118.78—with interest, as moneys not duly accounted for.

The answer of the defendant admits the receipt and expenditure of the money as stated in the complaint, and then alleges as a defence to the action that on October 22, 1870, a general order was made and issued by the secretary of the interior and signed by the commissioner of Indian affairs, and directed to the superintendent of Indian affairs in Oregon for his "guidance" in the matter of advertising for proposals to furnish supplies, as follows: "Referring to your letter of the ninth ultimo, submitting the names of newspapers in which ad-

vertisements for proposals for supplies required in the Oregon superintendency should be published, I have to advise you that, *by direction of the honorable secretary of the interior*, you are hereby authorized to publish such advertisements in the *Oregon Statesman*, Salem, and the *Oregonian*, Portland, Oregon;" that such order was made general to avoid the delay incident to procuring a special direction from Washington whenever the purchase of supplies became necessary; that the same was unrevoked and in full force at the date of the advertisements and expenditures in question; and that a copy of such order was "attached" to each of the bills for publishing said advertisements. It is also alleged, but unnecessarily, that the proposals received under these advertisements were approved by the secretary of the interior, and the purchase made accordingly.

The plaintiff demurs to this defence as insufficient, because it does not show that section 3828 of the Revised Statutes was complied with in expending said moneys. Said section 3828 (section 2 of the act of July 15, 1870; 16 St. 308) provides that "no advertisement, notice, or proposal for any executive department of the government, or for any bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such department; and no bill for any such advertising or publication shall be paid, unless there be presented with such bill a copy of such written authority."

Admitting the truth of the answer, as the demurrer does, it does not distinctly appear from the statement of the account by the auditor, or the argument of the counsel for the plaintiff, wherein the defendant failed to comply with said section 3828 of the Revised Statutes. For anything in the letter of the statute, or the subject-matter regulated by it, the authority to advertise might as well be general as special; that is, might, under the terms of the statute, be made to comprehend and authorize the publication of successive advertisements of a particular class or kind as well as a single one. Besides, these advertisements, being "for supplies," were such as the law required to be made, (section 3709, Rev. St.,) and the order of the secretary could only limit the number or place of publishing them by prescribing the newspapers in which they should be inserted. Whenever the defendant undertook to procure supplies for his superintendent, he was authorized and required by statute (section 3709, Rev. St.) to advertise a "sufficient time" for proposals, subject only to the

direction of the secretary as to the newspaper or papers in which the publication should be made.

Neither can the objection be that the order under which the defendant claims to have acted was made before he went into the office, for any general order or direction of the secretary concerning the conduct or management of this superintendency continued applicable and in force until revoked or superseded, unaffected by any change of superintendents.

The only other objection that could be made or has been suggested to the authority to publish, is that it did not "come" from the head of the department—the secretary of the interior—but only the commissioner of Indian affairs, by whom it was signed. The secretary of the interior is charged with the "supervision of public business" relating to the Indians. Section 441, Rev. St. In the department of the interior there is a commissioner of Indian affairs, who "shall, *under the direction* of the secretary of the interior, and agreeably to such regulations as the president may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations." Section 463, Rev. St. Upon these provisions of law the commissioner was the proper person for the superintendent to apply to for authority to advertise in the *Statesman* and *Oregonian*; and although, under section 3828, *supra*, the authority to do so must "come" from the secretary, it would, nevertheless, come to the superintendent *through* the commissioner.

Was it necessary also for the secretary to *sign* the order, as well as direct the commissioner to make it? I think not. The statute does not in terms require that he should, nor does the nature of the business or the relation between the parties make it necessary. The commissioner, as to Indian affairs, is the deputy or representative of the secretary, and the lawful channel of communication with Indian superintendents and agents. Upon the authority of his office, and as the representative of the secretary, he informed the defendant that by the direction of that official he was authorized to publish the advertisement in the newspapers mentioned. The authority professed to come from the head of the department, and it came through the proper officer. No one questions the *bona fides* of the transaction. The money has been honestly and beneficially used for the government, and the defendant ought to be credited with the amount, unless there is some technical difficulty in the way, and I see none.

The demurrer is overruled.

CRANE v. WATERS and others.

(Circuit Court, D. Massachusetts. February 23, 1882.)

1. LIBEL—PRIVILEGED COMMUNICATIONS.

In discussing the subject of a scheme or plan for making a railroad by the consolidation of certain short lines, and to obtain control of a certain railroad company by electing directors favorable to the scheme, a public speaker or writer has the qualified privilege which attaches to public affairs.

2. SAME—CHARACTER OF CONSTRUCTOR OF RAILROADS.

In such discussions the character of the constructor and manager of railroads is open to public discussion when his plans affect many interests besides those of the stockholders of one road.

3. SAME—DISTINCTION BETWEEN PUBLIC AND PRIVATE INTERESTS.

The distinction between the public and private affairs of a railroad is this: When a railroad is to be built, or a company to be chartered, the question whether it shall be authorized is a public one; but when the company is organized and the stock issued, anything which merely affects the value of the stock is private.

4. SAME—TRUTH AS A DEFENCE.

In discussions in good faith, of the public conduct and qualifications of public men, the defendant, it appears, is not held to prove the exact truth of his statements and the soundness of his inferences, provided that he is not actuated by express malice, and that there is reasonable ground for such statements and inferences.

Action of Tort for Libel. On demurrer.

The defendants published in their newspaper, the *Boston Daily Advertiser*, an article concerning an attempt of Edward Crane, the plaintiff, to procure the election of directors of the New York & New England Railroad Company at the then recent annual meeting. The article was entitled "History Repeated," and purported to give a narrative of the dealings of the plaintiff with the Boston, Hartford & Erie Railroad Company by which he had brought it to bankruptcy, and to give the impression that he intended to act in a similar way with the New York & New England, which was a corporation formed by the bondholders of the other road. The project attributed to the plaintiff included the buying up of certain railroads in Connecticut, consolidating them with the New York & New England Company, etc. It alleged that the plaintiff's schemes were exposed by skilful questioning at the meeting, and that he had retired discomfited.

The plaintiff, in his declaration, set out this article in full, and in the first count alleged damage generally; in the second that he was a manager and constructor of railroads, and was engaged in a business undertaking to make a through line between Boston and New York by the purchase and construction of railroads, and that the New York

& New England Railroad was to be a part of the line; but, by the publication of the libel, he lost the support of some of his associates, and of stockholders of that road, and suffered special damage.

The defendants answered—*First*, that the statements made in the article were true; *second*, that the railroad concerning which the article was written was a public work of great importance to the commonwealth and people of Massachusetts, and in which the commonwealth was a large stockholder; that the other stockholders were numerous, and could only be reached through the press; that the effort of the plaintiff to obtain control of the railroad was a matter in which the public were interested, and was a proper subject of discussion in the newspapers; and that the defendants, believing that such control would be a public misfortune, and would be a serious injury to the railroad and to the public, discussed the plaintiff's plans and qualifications in good faith, and without malice; and that they made only such statements and reflections as they believed, on due inquiry and reasonable grounds, to be true and just, and warranted by the plaintiff's acts. To this second part of the answer the plaintiff demurred.

A. B. Wentworth and F. F. Heard, for plaintiff.

Russell & Putnam, for defendants.

LOWELL, C. J. For the purpose of deciding this demurrer it must be assumed that the plaintiff had conceived and begun to carry out a plan for making a railroad from Boston to New York by the consolidation of certain shorter lines, and otherwise, and that it was a part of his plan to obtain control of the New York & New England Company by electing directors favorable to his scheme; that the publication of the article complained of interfered with this plan to his prejudice; and that the statements of the article were not true, but were published in good faith, without express malice, and were, upon reasonable inquiry by the defendants, believed by them to be true.

The contention then is, on the part of the defendants, that the subject-matter is one in which the public has an interest, and that in discussing a subject of that sort a public speaker or writer is not bound at his peril to see that his statements are true, but has a qualified privilege, as it has been called, in respect to such matters.

The modern doctrine, as shown by the cases cited for the defendants, appears to be that the public has a right to discuss, in good faith, the public conduct and qualifications of a public man, such as a judge, an ambassador, etc., with more freedom than they can take with a private matter, or with the private conduct of any one. In

such discussions they are not held to prove the exact truth of their statements, and the soundness of their inferences, provided that they are not actuated by express malice, and that there is reasonable ground for their statements or inferences, all of which is for the jury. *Kelly v. Sherlock*, L. R. 1 Q. B. 686; *Kelly v. Tinling*, Id. 699; *Morrison v. Belcher*, 3 F. & F. 614; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Davis v. Duncan*, L. R. 9 C. P. 396; *Gott v. Pulsifer*, 122 Mass. 235.

Some of the affairs of a railroad company are public and some are private. For instance, the honesty of a clerk or servant in the office of the company is a matter for the clerk and the company only. The safety of a bridge on the line is a subject of public moment. The public, in this sense, is a number of persons who are or will be interested, and yet who are at present unascertainable. All the future passengers on the road are the public, in respect to the safety of the bridge, and as they cannot be pointed out, you may discuss the construction of the bridge in public, though you thereby reflect upon the character of the builder. If this definition of the public is a sound one, the commonwealth, considered as a stockholder, is not the public, for its interests are entrusted to certain officers, who are easily ascertained; nor would the interests of the shareholders become a public matter merely by reason of their number, unless it were proved that it would be virtually impossible to reach them individually. If, therefore, the question were merely of the effect of the scheme upon the shares of the New York & New England Railroad Company, a corporation already chartered and organized, I should doubt somewhat whether it would be of a public nature. But, inasmuch as the project was one which affected a long line of road, as yet only partly built, and the consolidation of several companies, it assumes public importance. Perhaps the right of legislative interference may be taken as a fair test of the right of public discussion, since they both depend upon the same condition. The legislature cannot interfere in the purely private affairs of a company, but it may control such of them as affect the public. It cannot be doubted, I apprehend, that the legislatures of Connecticut and Massachusetts would have power to permit or to prohibit or to modify a scheme such as is now in question. It interests the public, consisting of the unascertained persons who will be asked to take shares in it, and those through whose land it will pass or whose business will be helped or hindered by it, that such a line should be well, and even

that it should be honestly, laid out, built, and carried through. For this reason the character of the plaintiff, as a constructor and manager of railroads, seems to me to be open to public discussion when he comes forward with so great and important a project affecting many interests besides those of the shareholders of one road; and that, therefore, the defendants, or any other persons, have the qualified privilege which attaches to discussions of public affairs. The distinction is this: that when a railroad is to be built, or a company to build it is to be chartered, the question whether it shall be authorized is a public one; when the company is organized and the stock is issued, anything which merely affects the value of the stock is private.

Demurrer to the answer overruled.

NOTE. The privilege which a communication receives arises from a right to say what is complained of, or from a sense of duty, public or private, legal or moral. *Portevin v. Morgan*, 10 Low. Com. Jur. 99; see *Streety v. Wood*, 15 Barb. 105; *Hanna v. De Blanquiere*, 11 Up. Can. Q. B. 310; *Hearne v. Stowell*, 12 Ad. & E. 719. Publishing what is true of a person is not an offence if done with good motives and for justifiable ends, (*De Bouillon v. People*, 2 Hill, 248,) where the object is to impart useful information to the community. *State v. Burnham*, 9 N. H. 34; *Morris v. Com.* 1 Va. Cas. 176; *Com. v. Clay*, 4 Mass. 163.—[Ed.]

In re CARY.

(*District Court, S. D. New York.* March 7, 1882.)

1. CONTEMPT—OFFICERS, WHEN NOT CHARGEABLE.

A sheriff or marshal, being indemnified to levy on specific property, should not be held chargeable with contempt upon an injunction order of dubious import of which he had no previous notice, and which referred to a judgment without date, and of different amount from that recited in his execution.

2. INJUNCTION—NOTICE TO BE SERVED ON PARTIES ENJOINED.

Parties and their attorneys, who are at all times accessible to service, should be properly served with notice of an injunction order if it be designed to bind them.

3. SAME—NECESSITY OF PERSONAL SERVICE.

The relaxation of the rule requiring personal service of an injunction in order to punish for contempt, extends no further than the exigencies of the case require to prevent a failure of justice, and does not dispense with the necessity of service where the parties are easily accessible.

4. SAME—MOTION TO HOLD IN CONTEMPT, WHEN DENIED.

Where an *ex parte* injunction in bankruptcy was obtained against a plaintiff, "his marshals, servants, and agents in charge of said execution," was served upon the marshal having the execution in charge, who thereupon returned the execution unsatisfied, and the injunction was never served upon the plaintiff or his attorney, though they were accessible daily; and six weeks afterwards an *alias* execution was issued by the clerk of the court, at the attorney's request, to another marshal, who levied thereunder, whereupon an order to show cause was obtained to punish for contempt the plaintiff, his attorney, and the last-named marshal, all of whom denied any notice or knowledge of the injunction until the service of the order to show cause, and a long litigation ensued, upon a reference to take proof of the facts, mostly occupied with the question of notice of the injunction:

Held, that the motion to hold in contempt should be denied, no excuse being shown for the want of service in the ordinary way, and that the court should refuse to entertain nice controversies of fact concerning indirect notice springing solely from laches in not making any service of the injunction order upon the parties sought to be held.

In Bankruptcy. Motion to punish for contempt.

H. C. Beach, for bankrupt.

Philo Chase, for Youmans and Prentiss.

John C. Lang, for Wagner.

BROWN, D. J. Cary was adjudicated a bankrupt on April 17, 1878. On the sixth of January, 1881, a judgment for \$45.72 was obtained against him by Youmans, in the third district court of this city, for an old claim of \$36. This claim was one of several against various persons which Youmans had placed in the hands of Prentiss, an attorney, for collection on shares without expense to Youmans, and the judgment was obtained through Prentiss as attorney. Execution was issued thereon by the clerk of that court on the same day to Taylor, one of the city marshals, who thereupon went with the execution to a store where the bankrupt was employed by his brother, and levied on certain property. On the following day the bankrupt presented a petition to this court, and obtained an injunction order, for the subsequent alleged violation of which this proceeding was had.

The injunction order refers to the petition as "annexed," and directs that all proceedings under "a certain judgment recovered in the third judicial district court of the city of New York by one Edgar W. Youmans against said bankrupt for a certain debt set forth in his said petition, amounting to the sum of \$36, and upon which said judgment execution appears to have been issued against the property and effects of said bankrupt, be stayed, and the said Edgar W. Youmans, his marshals, agents, and servants in charge of said writ of execu-

tion, be and they are, and every one of them is, hereby enjoined and restrained from making any levy upon or sale of the property and effects of said bankrupt until his application for discharge in bankruptcy by this court and now pending shall have been heard and determined, or the further order of the court." A certified copy of this order, not including the petition, was on the same day served upon Taylor, and no further proceedings were taken on the said execution, except that it was returned by the marshal "No property found. January 26, 1881." The injunction order was never served upon either Youmans or Prentiss, his attorney; and both deny emphatically all knowledge of it. On the tenth of February, 1881, Youmans sold and assigned his judgment to one Vonderschmidt, for whom Prentiss subsequently acted.

On February 21st, Prentiss requested the clerk of the court again to issue execution on the judgment, which he did, and delivered it to Wagner, another city marshal, for execution. The property in the store where the bankrupt was being claimed by his brother, Vonderschmidt, the assignee of the judgment, on February 23d, gave a bond of indemnity, with surety, to Wagner, the marshal, who on the 24th went to Cary's place and levied under the execution upon a quantity of clothes-hooks, the brother's property, and packed them in two packing cases, alleged to be the property of the bankrupt, and of the value of five dollars; and on February 25th removed them to an auction store for sale. The clothes-hooks were replevied in a suit brought by the bankrupt's brother against the marshal and Youmans, and that suit is still pending; the packing cases, the property of the bankrupt, of the alleged value of five dollars, have disappeared.

On the twenty-fifth of February a petition was presented to this court setting forth a part of the above facts only, asking for an order, which was granted on the 26th, to show cause why Youmans, Prentiss, and Wagner should not be punished for contempt in violating the injunction order of January 7th. A further application for restraining the sale of the goods levied on was denied, on the ground, as stated in the memorandum upon the papers, that "the goods being alleged not to belong to the bankrupt, an injunction as to them would be improper." The order to show cause was served upon the three respondents named, each of whom put in an affidavit denying any knowledge of the injunction until service of the order to show cause, upon which an order of reference to the register was made on May 4, 1881, to take proof of the facts; and upon his report, and all the papers in the case, the matter has been brought to a hearing.

It is to be regretted that so much time, both of the court and the parties, should be expended upon so trifling a matter. The claim that any essential principle is involved in it is dissipated by the ambiguous character of the injunction order itself, the entire want of service of it upon either of the respondents, and the doubt which still exists as to their knowledge of it—doubts which thus hang over every important element in the alleged contempt.

1. The enjoining part of the order of January 7th was not drawn in language exact enough or broad enough, if it were intended to enjoin Youmans, and all other persons, from any further proceedings upon any execution issued, or that might be issued, upon the judgment referred to. The only persons enjoined are the "said Edgar W. Youmans, his marshals, agents, and servants *in charge of said writ of execution*," and those persons, and no others, were enjoined "from making any levy upon or sale of said bankrupt's property." As it reads, its meaning and design would seem to be to stop further proceedings upon the execution then in the hands of Marshal Taylor. The order was served upon him alone. No attorney is named or referred to in the order; and, though both Prentiss, the attorney, and Youmans, the plaintiff, were all the time easily accessible, no attempt was made to serve or to notify either of them of the injunction. This confirms the apparent object of the order, as gathered from its language, viz., to restrain any levy or sale upon the execution then in the hands of Taylor. This injunction was obeyed by Marshal Taylor's return of that execution unsatisfied. There is nothing in this order which can apply in terms to Wagner, another marshal, to whom another execution was issued by the clerk of the court a month afterwards. He was never "in charge of the execution" referred to in the injunction order. Doubtless, the order might just as well have been drawn so as to restrain all proceedings by any person upon any other execution issued on the judgment; but it does not do so; and the failure either to express such an intention or to serve the order on Prentiss or Youmans, as would naturally have been done if there had been any such intention, leads me to the conclusion that such was not the actual design of the parties who obtained the order.

The act of March 2, 1831, (4 St. at Large, 487,) was designed to limit, and does limit, the power of the United States courts to punish for contempt to the specific cases therein named. That of disobedience "to any lawful order of the court" is the only one applicable here. *Ex parte Robinson*, 19 Wall. 505. To sustain proceedings

for contempt the order should be clear and certain in its terms, and as against a public officer, no doubt should exist whether it applied to him or embraced the acts complained of. *Weeks v. Smith*, 3 Abb. Pr. 211; *Whipple v. Hutchinson*, 4 Blatchf. 190; *Vose v. Trustees*, 2 Woods, 647.

2. The injunction order did not intelligibly recite the judgment referred to; the copy exhibited to Wagner referred to a petition "annexed" which was not annexed; and the copy of the order gave no date of the judgment, but referred to a judgment for \$36. The execution recited a judgment of \$45.72. The officer could not assume that the two judgments were the same. *In re Metcalf*, 46 Barb. 325, 329.

3. The property levied on was asserted by the bankrupt to be the property of his brother. Much of the controversy at the time of the levy related to that claim. The marshal was indemnified against it. As a last resort the injunction order was produced by the bankrupt, and shown, as he says, to the marshal, though the latter denies this, and it is not pretended that he had any previous knowledge of it. The circumstances were calculated to arouse the suspicion of the marshal upon these several claims. I think he was not required, being indemnified, to run the personal risk of having the goods spirited away, even if this dubious injunction order was exhibited to him, by forbearing from his levy, while he should endeavor to do the best he could to supply the defects of the injunction order by ascertaining whether it was intended to apply to him or to the judgment which he held.

4. As to Youmans and Prentiss the motion should be denied for additional reasons. The relaxation of the rule requiring personal service of an injunction order as the basis of proceedings for contempt, which is a well-settled ordinary rule, exists only in cases where it is necessary in order that the ends of justice should not be defeated. This relaxation is not designed to dispense in the slightest degree with the service of the order, or due notice of it to those who are designed to be bound by it, where such service may be easily procured in the ordinary course of legal proceedings. The cases in which it originated were those in which the party enjoined was personally in court and knew of the injunction order being directed, but violated it before it could be entered and served. *Skip v. Harwood*, 3 Atk. 564; *Cowell v. Collett*, 3 Atk. 567; *Hearn v. Tennant*, 14 Ves. 136; *Vassandan v. Rose*, 2 J. & W. 264; *Kimpton v. Eve*, 2 Ves. & Bea. 349; *McNeil v. Garratt*, 1 Cr. & Ph. 97; *Hull v. Thomas*, 3 Edw. Ch.

236; *People v. Brower*, 4 Paige, 405; *Haring v. Kauffman*, 2 Beas. 397; *In re Feeny*, 4 N. B. R. 233. In all these cases it either plainly appeared or was admitted that the persons proceeded against had full knowledge of the injunction, and either disobeyed it before the order was entered, or concealed themselves to evade service, or were out of the state where they were duly notified; and in several of the cases full notice of the injunction was given in writing, although there was no technical service of a copy of the order itself.

In the present case both Youmans and Prentiss, his attorney, were at their usual places of business during all the time from the granting of the *ex parte* order of injunction until the levy on the twenty-fifth of February, more than six weeks; yet no attempt was ever made either to serve them or to notify either of them of this injunction. Upon this hearing they both swear positively that the first knowledge they had of it was when the order to show cause for its violation was served upon them about February 28th. The evidence that Youmans had any knowledge of it is at best very indefinite and unsatisfactory. As regards Prentiss, there is some evidence of his knowledge of it through Taylor; but he swears that he did not read the order at the time it was handed him by Taylor, and lost it on his way to the office. If there had ever been any endeavors to serve or notify Youmans or Prentiss directly, such an alleged loss of the paper, though possible, would not be favorably considered. Nor can knowledge of an injunction order by an attorney be imputed to his principal, so as to sustain proceedings for contempt against the latter. *Satterlee v. De Comeau*, 7 Robt. 666; *In re Southside R. R.* 10 N. B. R. 274.

The moving papers also are defective as respects Youmans in not averring that he ever had either service or any knowledge of the injunction, in fact, or had ever done any act in known violation of it. This is a vital defect; Youmans has done nothing to waive this objection, and it is as available now as upon the return of the order to show cause.

But, in denying this motion as to them, I prefer to place my decision upon the broader ground that those who procure an *ex parte* injunction, and make no efforts to serve it upon the persons who they claim shall be bound by it, though they are easily accessible, are not entitled to proceed for contempt upon any accidental, doubtful, and disputed notice of the injunction alleged to have been conveyed indirectly only through other persons. Parties designed to be bound by an injunction have a right to expect service in the ordinary way,

if they are accessible; and if they are not so served, and no excuse for it appear, as to them the injunction should be deemed waived or as never in force.

In *James v. Downes*, 18 Ves. 522, 525, Lord Eldon says: "The court can never intend that the plaintiff, having obtained the order granting the injunction, is to lie by for four months as if it had not been granted. The court, interposing to assist the plaintiff, and prevent his losing the benefit of the process while he is actually pursuing it, cannot consider him entitled, under the order, for three or four months together;" and for the plaintiff's laches in that case in entering the order, though the defendant knew of the decision of the court, Lord Eldon dismissed the motion to punish the disobedience of it. In this case no reason existed for not observing the ordinary rule requiring service of the order upon Youmans and his attorney. In consequence of failure to do so, a long controversy has sprung up, occupied largely on the part of the bankrupt in endeavoring to prove knowledge of the injunction through indirect sources. His attorney has presented the matter with a zeal and care and thoroughness which, in a worthier subject, would deserve the highest praise; but, in my judgment, the court should refuse to entertain such close controversies of fact, concerning indirect notice, which arise solely through the laches of the parties in serving the original injunction order, and through the non-observance, without excuse, of the ordinary rule requiring personal service or notice of the injunction order, where practicable, in order to bring the party into contempt. *Whipple v. Hutchinson*, 4 Blatchf. 190; *Coddington v. Webb*, 4 Sandf. 639; 1 Daniell, Ch. Pr. (4th Ed.) 898, 1674.

On these grounds the petition and order to show cause are dismissed, with costs.

NOTE.

CONTEMPT. A contempt is a wilful disregard, disturbance of, or disobedience to, the rules or orders of a judicial or legislative body; (a) and it may be committed either in the presence of the court or body, or in its absence. If committed in its presence, it is a direct contempt; and if committed by officers of the court elsewhere than directly in its presence, it may be considered done in the presence of the court; (b) but if done by others than officers of the court and beyond its actual presence, it is a constructive contempt. (c) The main distinction lies in the mode of redress. In the case of a direct contempt the court may punish summarily by a fine, or the alternative of imprisonment; but in case of a constructive contempt the party in contempt must be brought in by attachment, as final judgment thereon cannot be rendered without an opportunity for a hearing. (d) In either case it is in the nature of a criminal action, (e) a *quasi crime in rem*, (f) a specific criminal offence, and the imposition of a fine is a judgment in a criminal case, (g) which the court has no power to vary after expiration of the term, (h) nor is the proceeding reviewable on appeal. (i) When the offence is committed not in the presence of the court, it must be judicially established, (j) and the party can be arrested at any time when found within the jurisdiction of the court. (k) The attachment for a contempt is a criminal procedure, (l) in which the party must appear in person and not by attorney, (m) and he has no right to a trial by jury. (n) The party charged may be amerced or discharged; (o) whence it results that a commitment in contempt is a commitment in execution, (p) and the party committed cannot be bailed, (q) though the practice as to bail is otherwise in England, (r) owing probably to the prerogatives of the peerage. For disobedience of an order of court the party may be committed till he obeys; (s) and a witness refusing to answer

(a) *Anderson v. Dunn*, 6 Wheat. 204.

(b) *People v. Wilson*, 64 Ill. 195; *Stuart v. People*, 4 Ill. 395.

(c) *Whitten v. State*, 36 Ind. 196.

(d) *Ex parte Kilgore*, 3 Tex. Ct. Ap. 247. See *McConnell v. State*, 46 Ind. 298; *Whitten v. State*, 36 Ind. 196; *Ex parte Wiley*, Id. 528.

(e) *U. S. v. Wayne*, Wall. Sr. 131; *Ex parte Kearney*, 7 Wheat. 38; *Wilson v. State*, 57 Ind. 71; *People v. Craft*, 7 Paige, 325; *Whitten v. State*, 36 Ind. 196; *Crook v. People*, 16 Ill. 531; *Pitt v. Davison*, 37 N. Y. 235; *Crosby's Case*, 3 Wils. 188.

(f) *State v. Tipling*, 1 Blackf. 317; *Ex parte Smith*, 28 Ind. 47; *Clark v. People*, 1 Breese, 266. See *State v. People*, 4 Ill. 395; *People v. Turner*, 1 Cal. 152; *Ex parte Adams*, 25 Miss. 883; *Gorham v. Luckett*, 6 B. Mon. 638; *Watson v. Williams*, 36 Miss. 331; *In re Moore*, 63 N. C. 397.

(g) *Fischer v. Hayes*, 6 Fed. Rep. 63; *S. C. 102 U. S. 121*; *Ex parte Crittenden*, 7 Pac. C. L. J. 483.

(h) *Fischer v. Hayes*, 6 Fed. Rep. 63; *Ex parte Crittenden*, 7 Pac. C. L. J. 483.

(i) *Hayes v. Fischer*, 102 U. S. 121; *S. C. 6 Fed. Rep. 63*.

(j) *Anderson v. Knox County*, 70 Ill. 65; *In re Cooper*, 32 Vt. 253; *State v. Woodin*, 5 Ind. 199; *Rex v. Almon*, Wilmot, 253.

(k) *Bowery Bank v. Richards*, 3 Hun. 366.

(l) *Hammell's Case*, 9 Watts, 421; *Cartwright's Case*, 114 Mass. 230.

(m) *People v. Wilson*, 64 Ill. 195; *Vertner v. Martin*, 10 Smedes & M. 103; *Ex parte Hamilton*, 51 Ala. 66.

(n) *Hollingsworth v. Duane*, Wall. Sr. 77. See *Resp v. Oswald*, 1 Dall. 319; *State v. Doty*, 32 N. J. L. 403; *State v. Matthews*, 37 N. H. 450; *Patrick v. Warner*, 4 Paige, 397; *People v. Bennett*, Id. 282; *Neel v. State*, 4 Eng. 259; *Ex parte Grace*, 12 Iowa, 204.

(o) *State v. Tipling*, 1 Blackf. 166; *Matter of Stephens*, 1 Ga. 584.

(p) *Kearney's Case*, 7 Wheat. 38; *Crosby's Case*, 3 Wils. 199.

(q) *Ex parte Alexander*, 2 Am. L. Reg. 44. See *Crosby's Case*, 3 Wils. 199.

(r) *Rex v. Lord Preston*, 1 Salk. 278; *Rex v. Davis*, 2 Salk. 608; *Chamber's Case*, Cro. Car. 133.

(s) *Tome's Appeal*, 50 Pa. St. 285; *In re Mut. L. Ins. Co.* 17 Bank. Reg. 368; *Bridges v. Sheldon*, 18 Blatchf. 507; *Vose v. Trustees, etc.*, 2 Woods. 647; *Ex parte Graham*, 3 Wash. C. C. 456; *Souter v. La Crosse R. R.* 1 Woolw. 80. See *Fischer v. Hayes*, 102 U. S. 121; *S. C. 6 Fed. Rep. 63*; *Taylor v. McFett*, 2 Blatchf. 305; *Reg. v. Wilkinson*, 41 Up. Can. Q. B. 44; *Ex parte Jones*, 13 Ves. Jr. 237;

may be committed till he answers.(t) Where the court had no jurisdiction of the cause its order thereon is void, and disobedience to it is no contempt;(u) so it is no offence to refuse to answer in a proceeding before a justice who had no jurisdiction or right to subpoena a witness.(v) If the fine be not paid the party may be committed to prison(w) till the fine is paid(x) at so much a day,(y) and the order need not recite the offence.(z) The court may make a subsequent order fixing the amount of the fine,(a) and it may fine a corporation as well as its agents.(b)

In case of a contempt in the presence of the court, it may imprison, in its discretion,(c) or may commit the prisoner till the further order of the court;(d) but a judgment or order that the prisoner stand committed till further order of the court, for refusal to obey a previous order, is illegal and void;(e) so an order that he surrender books, etc., in his hands as receiver to his successor is void.(f) Where imprisonment is designed only for a punishment, it should be certain and for a definite period.(g) Courts may commit for a period beyond the term at which the contempt is committed,(h) which is a distinguishing feature between the power of courts and that of legislative bodies, whose powers cannot extend beyond the session.(i) Every court has an inherent right to protect itself against a violation of its decency and propriety,(j) and an inherent power to punish for a contempt of its rules and orders;(k) but where they act only ministerially they have no such power.(l) Justices of the peace, acting judicially, have the same power as courts of record.(m)

Contempts in the presence of the court, and which may be summarily dealt with, have their examples in the following instances: Any disrespect to the judge sitting in court, or any breach of order, decency, or decorum by any one

Tichborne v. Mostyn, Law Rep. 7 Eq. 55, n.; *Reg. v. Castro*, Law Rep. 9 Q. B. 219. As for violation of an injunction: *Sickels v. Borden*, 4 Blatchf. 14; *Goodyear v. Mullee*, 5 Blatchf. 463; *Muller v. Henry*, 7 Law Rep. 772; S. C. 5 Sawy. 464; *Carstaedt v. U. S. Corset Co.* 13 Blatchf. 371; *Worcester v. Truman*, 1 McLean. 483.

(t) *Lott v. Burrell*, 2 Const. Ct. 167; *People v. Fancher*, 4 Thomp. & C. 467.

(u) *People v. Sturtevant*, 5 Seld. 263. See *People v. O'Neill*, 47 Cal. 109; *Rex v. Clement*, 4 Barn. & Ald. 218; *Sparks v. Martin*, Vent. 1.

(v) *In re Morton*, 10 Mich. 208. See *Bear v. Cohen*, 65 N. C. 511; *Rutherford v. Holmes*, 5 Hun. 317.

(w) *People v. Bennett*, 4 Paige, 282.

(x) *Fischer v. Hayes*, 102 U. S. 121; S. C. 6 Fed. Rep. 63; *Ex parte Crittenden*, 7 Pac. C. L. J. 483.

(y) *Ex parte Crittenden*, 7 Pac. C. L. J. 483.

(z) *Fischer v. Hayes*, 102 U. S. 121; S. C. 6 Fed. Rep. 63.

(a) *Fischer v. Hayes*, 102 U. S. 121; S. C. 6 Fed. Rep. 63.

(b) *U. S. S. Express Co. v. Memphis & Little R. R. Co.* 6 Fed. Rep. 237.

(c) *Middlebrook v. State*, 43 Conn. 257.

(d) *Yates' Case*, 4 Johns. 317; *Williamson's Case*, 36 Pa. St. 24; *Tome's Appeal*, 56 Pa. St. 235. *Contra*, *In re Alexander*, 2 Am. L. Reg. 44; 9 R. I. 248.

(e) *Hinckley v. Pirfenbrink*, 96 Ill. 63.

(f) *Hinckley v. Pirfenbrink*, 96 Ill. 63.

(g) *Buckley v. Com.* 2 J. J. Marsh. 575; *Com. v. Roberts*, 2 Clark, (Pa.) 310; *In re Crawford*, 13 Adol. & E. 613; *Rex v. James*, 5 Barn. & Ald. 594; *Hinckley v. Pirfenbrink*, 96 Ill. 68.

(h) *Ex parte Maulsby*, 13 Md. 642.

(i) *Anderson v. Dunn*, 6 Wheat. 294; *Ex parte Maulsby*, 13 Md. 642; *Ex parte Nugent*, 7 Pa. L. J. 107; *Reg. v. Paty*, 2 Ld. Raym. 1105; *Crosby's Case*, 3 Wils. 204.

(j) *State v. Tipton*, 1 Blackf. 166; *Kernodle v. Cason*, 25 Ind. 362; *Ex parte Smith*, 28 Ind. 47; *Redman v. State*, Id. 205; *Whitten v. State*, 36 Ind. 196; *Brown v. Brown*, 4 Ind. 627.

(k) See *Desty*, Crim. Law, § 73a, note 7, 73d; and for constructive contempts see *Id.* 73a, note 8.

(l) *Clark v. People*, 1 Breese, 266; *Gorham v. Lockett*, 6 B. Mon. 638; *Ex parte Smith*, 28 Ind. 47; and see *People v. Turner*, 1 Cal. 162; *Watson v. Williams*, 36 Miss. 331; *In re Moore*, 63 N. C. 397; *Stuart v. People*, 3 Scam. 395.

(m) *Murphy v. Wilson*, 46 Ind. 537; *Brown v. People*, 19 Ill. 613; *Robinson v. Harlan*, 2 Ill. 237; *Tindall v. Meeker*, Id. 137; *Bowers v. Green*, Id. 42. See *Rex v. Robinson*, 2 Burr. 799; but see *Rhinehart v. Lantz*, 4 N. J. L. J. 23; *Lampher v. Dewell*, 9 N. W. Rep. 101.

present, or any assault made in view of the court, is a contempt punishable summarily;(n) as for violence or threats to a judge, justice, officer of a court, juror, witness, or party litigant in respect of any act or proceeding in court;(o) or any insulting or abusive language offered to a judge;(p) or unprofessional or disrespectful language used by an attorney before the court;(q) or calling another a liar in presence of the court and within hearing of the officers.(r) So of contempts in the constructive presence of the court; as, after the judges had vacated the bench for a recess, defendant approached the chief justice, and, using abusive and vituperative language, he made a violent assault on the judge.(s) Proposing to a juror to signal from the window of a jury-room how the jury stood with regard to the verdict, is a contempt;(t) or to strike a defendant in the lobby of the court after the trial;(u) or for an acquitted prisoner to threaten vengeance against witnesses within the precincts of the court;(v) or for arresting a party or witness while attending court, or for serving process on him in the presence, actual or constructive, of the court;(w) or for mustering a body of militia so near a court as to disturb its deliberations.(x)

Misconduct of inferior judges and magistrates, such as usurping jurisdiction, disobeying writs, disregarding adjudications of superior courts, and refusing to proceed on causes, are contempts of court.(y) So disobedience to a peremptory *mandamus*, issued to an inferior officer or court, is a contempt;(z) but it is not a contempt of court for an officer to resign, to avoid obedience to a writ of *mandamus*, where he has an unrestricted right to resign.(a)

The disobedience or misconduct of the officers of the court are deemed to be done in the constructive presence of the court; so it is a contempt of court for an inferior officer to disobey the orders of the court.(b) It is a contempt of court for an officer of the court to misbehave; as for a sheriff to be guilty of malpractice, (c) by not making return of a writ,(d) or by pocketing a venire;(e) or to refuse and be culpably negligent in collecting a debt in gold and silver coin,(f) or to make a levy after appointment of a receiver,(g) or to carelessly allow an escape;(h) or for a clerk of the court to fraudulently withhold

(n) *State v. Tipton*, 1 Blackf. 166; *Brown v. Brown*, 4 Ind. 627; *Kernodle v. Kasson*, 25 Ind. 362; *Ex parte Smith*, 23 Ind. 47; *Redman v. State*, Id. 205; *Whitten v. State*, 36 Ind. 196; *Yates v. Lansing*, 9 Johns. 395; *Desty, Cr. Law*, § 73a, note 2.

(o) *Com. v. Feely*, 2 Va. Cas. 1; *Littler v. Thompson*, 2 Beav. 129.

(p) *Redman v. State*, 23 Ind. 205; *Androscoggin & K. R. Co. v. Androscoggin Bk. Co.* 49 Me. 400; *Charlton's Case*, 2 Mylne & C. 316.

(q) *Redman v. State*, 23 Ind. 205; *Brown v. Brown*, 4 Ind. 627; *Withers v. State*, 36 Ala. 252.

(r) *U. S. v. Emerson*, 4 Cranch, C. C. 188.

(s) *State v. Garland*, 25 La. Ann. 532.

(t) *State v. Doty*, 32 N. J. L. 403.

(u) *Rex v. Wigley*, 32 Eng. C. L. 415.

(v) *U. S. v. Carter*, 3 Cranch, C. C. 423.

(w) *Davis v. Sheeran*, 1 Cranch, C. C. 287; *U. S. v. Schofield*, Id. 130; *Blight v. Fisher*, Pet. C. C. 41; *Bridges v. Sheldon*, 7 Fed. Rep. 19.

(x) *State v. Coulter, Wright*, 421; *State v. Goff*, Id. 78.

(y) *People v. Judges*, 2 Caines, 97; *Swift v. State*, 63 Ind. 81.

(z) *Ex parte Carnochan*, T. U. P. Charl. 315. See *State v. Hunt, Cox*, 287; *Patchin v. Mayor of Brooklyn*, 13 Wend. 664; *State v. Smith*, 7 Iowa, 334; *U. S. v. Lee Co.* 9 Int. Rev. Rec. 25.

(a) *Watts v. Lauderdale Co.* 14 Cent. Law J. 210.

(b) *Swift v. State*, 63 Ind. 91; *The Laurens*, Abb. Adm. 508.

(c) *Ex parte Summers*, 5 Ired. 149; *State v. Williams*, 2 Speers, 26.

(d) *Brockway v. Wilber*, 5 Johns. 356; *U. S. v. Bollman*, 1 Cranch, C. C. 373.

(e) *Keppelle v. Williams*, 1 Dall. 29.

(f) *Rice v. McClintock, Dudley*, 354.

(g) *Com. v. Young*, 33 Leg. Int. 163.

(h) *Craig v. Maltbie*, 1 Ga. 544.

moneys belonging to an estate;(i) or for gross negligence on the part of a prior clerk of the court;(j) as for refusing to furnish copies of papers wanted on the trial;(k) or for embezzlement of funds by a receiver;(l) and so where a corporation is made a depository of the funds of the court.(m) Jurors receiving a bribe to influence their verdict are guilty of a contempt;(n) or for conferring with a party to the suit during trial;(o) or voluntarily expressing an opinion as to the guilt of the prisoner, for the purpose of being excused for disqualification;(p) or for leaving the court-room without consent;(q) or after retiring to hold a conversation with others than officers of the court.(r)

Attorneys are officers of the court, and can only be deprived of their offices by judgment of the court, after opportunity to be heard has been afforded;(s) but solicitors, by gross fraud and corruption, doing injustice to clients, or for other dishonest practices, may be guilty of contempt;(t) as for bringing an action in the name of another without his authorization or consent,(u) or for appearing and confessing judgment without authority.(v) So an attorney is liable for unprofessional and disrespectful language before the court;(w) or for filing an indecent petition;(x) or for instituting a fictitious suit;(y) or for making use of a false instrument to prevent the course of justice;(z) or for suing out an attachment for a witness who has not been served with process.(a) But an attorney refusing to defend a poor person, on appointment by the court, without a fee, is not a contempt;(b) nor is it a contempt to advise a client to escape if he cannot procure a continuance;(c) nor is reading an affidavit for a change of venue, on the ground of prejudice of the judge, a contempt.(d)

Others than officers of the court may be guilty of contempt; for all acts calculated to impede, embarrass, or obstruct courts of justice may be considered done in presence of the court;(e) as the refusal of a witness to be sworn from conscientious scruples;(f) or refusal to answer a proper question before a grand jury;(g) but not if in the assertion of a constitutional right.(h) So a witness persisting in remaining in a court-room from which he has been excluded is a contempt;(ii) but it is not a contempt for a witness to leave the court when permitted by the party summoning him.(jj) Any act which tends to impede

(e) *State v. Tipton*, 1 Blackf. 166; *Connor v. Archer*, 1 Speers, 89.

(f) *Com. v. Snowden*, 1 Brewst. 218.

(k) *Delaney v. Regulators*, 1 Yeates, 403.

(l) *Cartwright's Case*, 114 Mass. 230. See *Pitman's Case*, 1 Curt. 186.

(m) *In re Western, etc., Ins. Co.* 33 Ill. 289.

(n) *Harrison v. Rowan*, 4 Wash. C. C. 32.

(o) *In re May*, 1 Fed. Rep. 737.

(p) *U. S. v. Devaughan*, 3 Cranch, C. C. 84.

(q) *Ex parte Hill*, 3 Cow. 355.

(r) *State v. Helvenston*, R. M. Charl. 48.

(s) *Ex parte Garland*, 4 Wall. 378; *Ex parte Heytron*, 7 How. (Miss.) 127; *Fletcher v. Daingerfield*, 20 Cal. 427; *Ex parte Bradley*, 7 Wall. 364.

(t) *Ex parte Pater*, 5 Best & S. 299.

(u) *Scott v. John*, 15 Ala. 566; *Butterworth v. Stagg*, 2 Johns. Cas. 291.

(v) *Denton v. Noyes*, 6 Johns. 296.

(w) *Brown v. Brown*, 4 Ind. 627; *Redman v. State*, 28 Ind. 205; *Withers v. State*, 36 Ala. 252.

(x) *Brown v. Brown*, 4 Ind. 627.

(y) *Lord v. Venzie*, 8 How. 254; *Smith v. Junction R. Co.* 29 Ind. 546; *Smith v. Brown*, 3 Tex. 360.

(z) *Rex v. Mawbey*, 6 Term Rep. 619.

(a) *Butler v. People*, 2 Col. 295.

(b) *Blythe v. State*, 4 Ind. 625.

(c) *Ingle v. State*, 8 Blackf. 574.

(d) *Ex parte Curtis*, 3 Min. 274.

(e) *People v. Wilson*, 64 Ill. 195; *Stuart v. People*, 4 Ill. 395; *Thompson v. Scott*, 4 Dill. 506.

(f) *Stansbury v. Marks*, 2 Dall. 213; *U. S. v. Coolidge*, 2 Gall. 364; *Bryan's Case*, 1 Cranch, C. C. 151; *Com. v. Roberts*, 2 Pa. L. J. 310; *Rex v. Preston*, 1 Salk. 278.

(g) *U. S. v. Canton*, 1 Cranch, C. C. 150.

(h) *People v. Kelly*, 24 N. Y. 74.

(ii) *People v. Boscovich*, 20 Cal. 436.

(jj) *State v. Nixon*, Wright, 763.

the course of justice is a contempt; as participating in a rescue;(k) or an attempt by a master to remove his slave beyond the jurisdiction of the court pending a petition for his freedom;(l) or disobedience to an injunction; and every member of a corporation who joins is liable.(m) So non-compliance with the terms of a master's sale is a contempt.(n) So threatening the prosecutor of another with danger to his life is a contempt.(o) Using any means to prevent a witness from attending is a contempt;(p) or for a witness or bystander to communicate with the grand jury touching a complaint before them;(q) or procuring worthless bail and suborning perjury in connection;(r) or taking papers from the files of court and refusing to return them after order made;(s) or for a party, when books are submitted to his inspection, to break open parts sealed up and not relating to the subject of the action.(t)

A contempt may be committed by publication, by impugning the honesty or impartiality of the judge, or exciting public prejudice.(u) So any public discussion which interferes with the course of justice is a contempt;(v) as a published article tending to degrade and scandalize the court, overawe its deliberation, and extort a decision;(w) as an attorney publishing strictures on the opinion of the court in order to prejudice the cause.(x) Libellous publications relative to court proceedings, if calculated to embarrass the administration of justice;(y) as speaking disrespectfully of a grand jury, or publishing defamatory notices concerning them;(z) or publishing any matter tending to prejudice the minds of the jury;(a) or writing a letter to the grand jury to asperse their motives;(b) or to influence them;(c) or to write a letter to a judge, containing insulting language, concerning his decision;(d) or sending a fictitious letter, signed "summoning bailiff," to special jurors, falsely stating that the trial was put off, is a contempt of court.(e)—[ED.]

(k) *State v. Bergen*, 1 Dutch. 209.

(l) *Richard v. Van Meter*, 3 Cranch, C. C. 214. See *Thornton v. Davis*, 4 Id. 500.

(m) *Davis v. Mayor of N. Y.* 1 Duer, 457; *People v. Compton*, Id. 512.

(n) *Haig v. Commissioner*, 1 Desauss. 112; *Brasher v. Cortlandt*, 2 Johns. Ch. 505.

(o) *Rex v. Hill*, 2 Bl. 1110.

(p) *Com. v. Feely*, 2 Va. Cas. 1.

(q) *Bergh's Case*, 10 Abb. Pr. (N. S.) 266.

(r) *In re Hirst*, 9 Phila. 216; *Hull v. L'Eplattimer*, 49 How. Pr. 500.

(s) *Barker v. Wilford, Kirby*, 235.

(t) *Dias v. Merle*, 2 Paige, 494.

(u) *Reg. v. Skipworth*, 12 Cox, C. C. 371; *Reg. v. De Castro*, L. R. 9 Q. B. 230. See 1 Green, C. R. 121.

(v) *Desty*, Cr. L. § 73b, note 13.

(w) *People v. Wilson*, 64 Ill. 195. See *Hollingsworth v. Duane*, Wall. Sr. 77; *Reg. v. Onslow*, 12 Cox, C. C. 358.

(x) *Matter of Darby*, 3 Wheel. C. C. 1; *Reg. v. Wilkinson*, 41 Up. Can. Q. B. 42; *Higginson's Case*, 2 Atk. 469.

(y) *State v. Morrill*, 16 Ark. 384; *Stuart v. People*, 4 Ill. 405.

(z) *Van Hook's Case*, 3 City Hall Reg. 64; *Matter of Spooner*, 5 City Hall Reg. 109. See *Storey v. People*, 79 Ill. 45.

(a) *Matter of Staroc*, 49 N. H. 428; 2 Ark. 409; *Ex parte Jones*, 13 Ves. Jr. 237.

(b) *Bergh's Case*, 10 Abb. Pr. (N. S.) 266.

(c) *Com. v. Crans*, 3 Pa. L. J. 442.

(d) *In re Pryor*, 18 Kan. 72.

(e) *Rex v. Lucas*, 3 Burr. 1564.

MORA v. NUNEZ and others.

(Circuit Court, D. California. February 20, 1882.)

1. VOID SALE UNDER JUDGMENT FOR TAXES.

A sale of lands to the highest bidder under an execution issued upon a personal judgment for taxes, recovered under the statute of California of May 17, 1861, (St. 1861, p. 471,) requiring the sale of the "smallest quantity that any one will take and pay the judgment," and the tax deed issued upon such sale, are void.

2. MEXICAN GRANT PATENT.

A patent issued upon the confirmation of a Mexican grant under the act of congress of 1851, to ascertain and settle land titles in California in an action at law, is conclusive evidence, as against one having no patent, not only of the validity of the grant, but of the correct location of the claim confirmed, so as to embrace the lands as described in the patent.

3. PATENTS—DECREEES OF CONFIRMATION—CONFLICT OF.

A claim to certain small tracts of land, church buildings situate thereon, and appurtenances, was confirmed under the act of 1851; in due form surveyed and located under the act of 1860; and patented as so located to Joseph S. Alemany, bishop of Monterey. Another grant, of much larger dimensions, was confirmed to Eulogio de Celis, the boundaries described in the decree of confirmation, including the said lands so patented to Bishop Alemany, without any exception of said lands in said decree. The certified survey and plat of said grant subsequently approved by the order or decree of the district court, and the patent issued thereon, in express terms reserved and excepted the lands before patented to Bishop Alemany, thereby excluding them from the operation of the patent issued to De Celis. *Held*, that whether the said survey and patent rightfully or wrongfully excluded said lands, the patent was conclusive as to the title in an action at law, and the patent including the lands must prevail over the patent excluding them, and the decree of confirmation upon which it issued.

J. T. Doyle, for plaintiff.

E. J. Pringle and *B. S. Brooks*, for defendants.

SAWYER, C. J. This is an action to recover the lands known as the Mission Rancho of San Fernando, situate in Los Angeles county. The plaintiff, in his complaint, seeks to recover the entire rancho, containing upwards of 121,000 acres. But the defendant, by supplemental answer, alleges that the plaintiff, subsequent to the commencement of the action, parted with his title to a large portion of the rancho, the title to which has become vested in the defendant; and the proofs are admitted to be sufficient to sustain the supplemental answer as to the lands described in it. The contest is, therefore, now limited to certain small parcels of land, containing in the aggregate about 76 acres, embracing the church and appendages and lands claimed to belong thereto, covered by a patent issued to Arch-

bishop Alemany. The title to these parcels rests, firstly, upon an execution sale; and, secondly, upon a patent to Archbishop Alemany.

In June, 1861, the district attorney of San Joaquin county brought an action in the fifth judicial district in said county of San Joaquin against Andreas Pico, a resident of Los Angeles county, for certain delinquent taxes levied against said Pico for two fiscal years, ending in March, 1859 and 1860, in the county of San Joaquin, upon lands known as the Moquelemos grant, situated in said county. He prayed judgment for \$2,671, with costs and charges; that the said land and improvements be decreed to be sold to satisfy the taxes and charges; and for such other and further relief as might be just and equitable.

This action is expressly stated in the complaint to be brought in pursuance of an act of the legislature of the state entitled "An act to legalize and provide for the collection of delinquent taxes in the counties of this state," approved May 17, 1861. This act legalizes the taxes for the fiscal years ending March 1, 1859, and March 1, 1860; and in case they cannot otherwise be collected, provides for collecting them by suit in a prescribed form. The complaint is drawn and the suit prosecuted in accordance with the provisions of the act. The defendant Pico, having been served with the summons, appeared and demurred. The demurrer having been overruled, in due time, on December 26, 1861, a personal judgment, in default of an answer, was rendered against Pico for \$3,339.55 and costs. There was no decree for a sale of the lands upon which the taxes were levied, and upon which they were a lien. No transcript of this judgment was ever filed in Los Angeles county, nor was there any record of a lien of any kind made in that county. On April 29, 1862, an execution in the ordinary form, upon a personal money judgment at law, issued to the sheriff of Los Angeles county, commanding him to satisfy the execution out of the personal property, if sufficient could be found; and if sufficient could not be found, then out of the real property "belonging to him, Pico, on the day when the said judgment was docketed in the county aforesaid, or at any time thereafter." There is some ambiguity as to which county, San Joaquin or Los Angeles, this clause refers.

The sheriff's return certified that "he served the said writ of execution by levying on" all the right, title, and interest of Pico in the rancho San Fernando, in Los Angeles county, but he does not state what acts he performed to constitute the levy. The return also shows that on June 9, 1862, he did "sell the lands and premises above mentioned and described to Thadeas Amat, he being the highest bidder for the same, to-wit, for the sum of \$2,000." The lands described and sold embraced upwards of 121,000 acres. The published notice of sale, annexed to the return, is that I "shall expose for sale, at public auction, for cash, to the highest bidder;" and the sheriff's deed recites that he did "sell the premises at public auction, * * * at which sale the said premises were struck off and sold to Thadeas Amat for the sum of \$2,000, the said Thadeas Amat being the highest bidder, and that being the highest sum bidden, and the whole price paid for the same."

The foregoing are the facts upon which the title under the execution sale rests. The title under the patent rests upon the following facts:

Joseph Sadoc Alemany, Catholic bishop of the diocese of Monterey, on February 19, 1853, filed his petition with the commissioners to ascertain and settle land titles in California under the act of congress of 1851, in which he claimed the confirmation to him and his successors of certain church property described "to be held by him in trust for the religious purposes and uses to which the same have been respectively appropriated," said property consisting of "church edifices, houses for the use of the clergy and those employed in the services of the church, church-yards, burial grounds, gardens, orchards, and vineyards, with the necessary buildings thereon and appurtenances;" alleging that the same had been recognized as the property of said church by the laws of Mexico in force at the time of the cession of California to the United States. The occupation by the church is claimed in the petition to have commenced some time in the last century. On December 18, 1855, the board of land commissioners confirmed the claim to lands "at the mission of San Fernando," described in the decree as follows: "The church and the buildings adjoining thereto in a quadrangular form, and the house connected with the same by a yard at the south-west corner of said quadrangle, which are known as the church and mission buildings of the mission of San Fernando, situated in the county of Los Angeles, together with the land on which the same are erected, and the curtilages and appurtenances thereto belonging, and the cemetery enclosed with an adobe wall adjoining said church." This decree became final, by dismissal of the appeal, March 15, 1858.

A survey and plat were made, filed, and certified August 6, 1861, in pursuance of the act of 1860; and a patent issued to said Bishop Alemany, May 13, 1862, embracing eight parcels of land described in the plat and survey, and being the same several parcels particularly described in the third supplemental answer filed in this case. They embraced the orchards and vineyards used by the mission at a little distance from the church building. The plaintiff has such right of possession as is conferred by said patent.

On October 7, 1852, Eulogio de Celis filed his petition with the said board of land commission praying a confirmation to him of the mission of San Fernando rancho, his title being a "deed of grant" made to him on June 17, 1846, by Pio Pico, governor of California. This petition included the lands hereinbefore mentioned patented to Bishop Alemany. The claim was confirmed July 3, 1855, and the decree became final, by dismissal of the appeal, March 15, 1858. The description in the decree of confirmation is as follows: "The land of which confirmation is hereby given is called the ex-mission of San Fernando, situate in the county of Los Angeles, and to be located as the boundaries are known and recognized on the seventeenth day of June, 1846. Bounded on the north by the rancho called San Francisco, on the west by the mountains Santa Susanna, on the east by the rancho Miguel, and on the south by the Portosuelo." A survey and plat having been made and filed in 1861, and notice given and the survey returned into court under the act of 1860, afterwards, August 14, 1865, proceedings were had in the district court by which the eastern boundary line of the rancho was modified, and subsequently,

after the repeal of the act of 1860, an amended survey, in pursuance of the said decree modifying said eastern boundary, was returned into court. Upon said amended survey, with other amendments and certain reservations approved by the court, a patent was issued to the petitioner and confirmed on January 8, 1873. The title claimed under said grant and patent has become vested in the defendants. In addition to the foregoing facts, it is recited in said patent that "the district court erroneously assumed jurisdiction over said resurvey, and amended and approved the same, reserving therefrom the rancho 'El Encino,' confirmed and patented January 8, 1873, to Vincente de la Ossa and others, and the eight tracts of land known as the mission of San Fernando, confirmed and patented May 31, 1864, to Joseph S. Alemany, bishop of Monterey, and to his successors, which reservations are satisfactory to the *parties legally entitled to this patent*, as appears by their acceptance of these presents as a good and valid patent for the lands confirmed, as aforesaid," and that "the plat hereunto annexed in all respects conforms to the aforesaid decree and survey made on the fourteenth of August, 1865, by the United States district court aforesaid, except that the rancho 'El Encino,' patented January 8, 1873, and the eight tracts of land known as the mission of San Fernando, patented May 31, 1864, to Joseph S. Alemany, bishop of Monterey, and to his successors, are reserved therefrom." Then follow the other usual recitals, with the certificate of the surveyor general giving a description of the lands, at the close of which description it is said: "From which are to be deduced the areas of the following-described tracts confirmed by the United States district court to other confirmees, which tracts lie entirely within the area comprised by the boundaries described, namely: *First*, 'El Encino.' * * * Also, eight tracts of land at the mission San Fernando, confirmed to J. S. Alemany, bishop of Monterey, the boundaries of which are described as follows;" giving the boundaries as set forth in the said patent to Bishop Alemany. The patent then proceeds with the granting clause, by which the United States gives and grants "to the said Eulogio de Celis, and to his heirs, the tract of land embraced and described in the foregoing survey, *excepting and reserving therefrom* the rancho 'El Encino,' * * * and the eight tracts of land known as the mission of San Fernando, containing in the aggregate 76.94 acres, patented May 31, 1864, to Joseph S. Alemany, Bishop of Monterey, and his successors."

The first point argued by counsel is as to the validity of the sheriff's sale and deed. A sale upon a judgment rendered for unpaid taxes, recovered under the same act, made in the same manner, and the deed containing similar recitals, was held to be void by the supreme court of the United States in *French v. Edwards*, 13 Wall. 511. The same point was decided the same way by this court in *Le Roy v. Reeves*, 5 Sawy. 102, and by the supreme court of California in *Carpenter v. Gann*, 51 Cal. 193, and *Hewell v. Lane*, 53 Cal. 213. All these cases arose under the same act. It is attempted to distinguish the present case from those cited, on the ground that those cases were proceedings

in rem to enforce liens for taxes upon the lands taxed strictly in pursuance of the statute; while, in this case, it is claimed that the action is simply one in *assumpsit* at common law to recover a debt due, without any reference to the mode in which the liability accrued; and that the execution in the ordinary form, upon a personal money judgment, was issued to and property sold under it in another county, which property had no relation whatever to the taxes, there being no lien upon it till an actual levy of the execution. But upon looking into the judgment roll it is apparent on the record that the action is for taxes, and it expressly purports to be brought under the provisions of that act. The allegations of the complaint and all the proceedings are strictly in pursuance of the provisions of that act, and, in other respects, of the Code of Civil Procedure, which are made applicable by the terms of the act, except so far as limited by that act itself. The complaint described the lands situated in San Joaquin county upon which the taxes were assessed, and upon which they were a lien, and prayed a judgment for sale of the premises to satisfy the lien. But when we come to the judgment which was entered in default of an answer, there is, it is true, simply a personal judgment for so much money; that is to say, only a part of the relief prayed in the complaint, and to which the people were entitled under the act, was granted. Why the district attorney did not take all the relief prayed, and which the statute under which he proceeded authorized, when he had a lien upon the 11 leagues of land upon which the taxes sued for were assessed, does not appear. It is a public historical fact, however, well known in California, that the decree of the district court confirming the Moquelemos grant was, in 1860, reversed by the United States supreme court upon principles that would necessarily result, as it finally did, in its ultimate rejection as fraudulent, (*U. S. v. Pico*, 22 How. 407;) and if it is admissible to indulge in conjectures, it is not improbable that the failure of title to the lands assessed rendered a decree for a sale useless, and made it necessary to look elsewhere for satisfaction of the now baseless taxes sued for assessed against Pico and the land. Be this as it may, the proceedings up to this point were in strict conformity to the act validating the taxes for those years in question, and providing a mode for their collection, and only fell short in that the judgment did not give all the relief to which the complainants were entitled.

The act authorized the relief granted in the form granted, and more. The supreme court of California necessarily regarded the action as brought under this act, and as not being otherwise authorized by law,

when it subsequently reversed the judgment for the tax, as it did on the ground that there was no averment in the complaint of an inability to otherwise collect the taxes, which averment was held to be necessary to show a cause of action. *People v. Pico*, 20 Cal. 595. What, then, are the provisions and limitations of that act? One of the provisions is that "judgments rendered in such cases in the district court shall be docketed and become liens upon *all property of the defendant* liable to taxation, and may be enforced against the same." St. 1861, p. 472, § 4. All property of the defendant, then, may be made liable to the personal judgment. Another provision is that the Code of Civil Procedure is "made applicable to the proceedings under this act, * * * so far as the same is not inconsistent with the provisions of this act," (Id. § 5;) and "*any deed derived from a sale of real property under this act shall be conclusive, etc.* * * * "Provided, that the sheriff, in selling said property, *shall only sell the smallest quantity that any purchaser will take and pay the judgment and costs.* Id. § 5. There is no remedy or proceeding to enforce civil rights under our laws except the Code of Civil Procedure, and such other proceedings as are expressly provided for in some other general or special statute. This act, as is seen, therefore, authorizes the personal judgment for a tax, which may be enforced against real property other than that assessed, the Code of Civil Procedure to enforce the tax being applicable only "so far as the same is not inconsistent with the provision of this act." *Any deed derived from sale of real property under this act "shall be conclusive," etc.*: "provided, that the sheriff, in selling, *shall only sell the smallest quantity that any purchaser will take and pay the judgment and costs.*" This is expressly prohibitory language, and is wholly inconsistent with the provisions of the Civil Code authorizing a sale upon executions to the highest bidder, and with any other provisions of our law authorizing a forced sale of real property to satisfy any judgment or demand. It takes away the power of the sheriff to sell in any other mode. It governs and controls the sale, and a sale in the prohibited mode is necessarily void. The sale was for a tax, merged, it is true, in the judgment. But it was that very case, and no other, that the statute was dealing with; and a sale upon an execution issued upon a judgment for the tax so merged, was the kind of sale at which the prohibition was expressly aimed. It is also true that the execution does not disclose the fact that the judgment was for a tax, but the judgment record does, and that is notice to all the world.

The fact that the execution is regular in form for a money judgment, under the Code of Civil Procedure, can no more affect the power of the sheriff to sell in the mode prohibited than an execution entirely regular, and apparently valid upon its face, issued upon a judgment absolutely void upon the face of the record. I am unable to distinguish this case from the cases cited, and must hold the sale and the sheriff's deed to be void. This view renders it unnecessary to consider the other objections to the validity of the sale.

As to the second ground relied on for a recovery:

It appears from the facts found that the plaintiff has a patent issued upon a confirmation of a claim arising under the laws of Mexico, which includes eight small tracts of the land described in the complaint, amounting in the aggregate to a little over 76 acres; while the patent of the defendants, in express terms, reserves and excludes those tracts from the operation of their patent. To those tracts, then, the plaintiff has a patent of the United States, and the defendants have none. It is claimed by defendants that their decree of confirmation covers these pieces of land; that they ought, therefore, to have been included in the patent, and that their exclusion was unauthorized and without effect. I do not so understand the law, as settled in regard to such titles, as applied to actions at law to recover the possession of lands. As I understand the law as settled in a long line of decisions in the supreme court of California, and now affirmed and fully established by the decisions of the supreme court of the United States, the patent issued upon a confirmed Mexican grant is the final, authentic, and conclusive record which establishes the legal title in the patentee, which must prevail in an action at law against any party having no patent to the land; that it is conclusive and unassailable collaterally by any party having no patent. This is so held, following the California decisions, in *Beard v. Federey*, 3 Wall. 492, where the patent is declared to be record evidence that not only the claim is valid, but that the grant "is correctly located now so as to embrace the premises as they are surveyed and described," and that "it is in this effect of the patent as a record of the government that its security and protection chiefly lie." So, also, the principle is asserted in *Mora v. Foster*, 3 Sawy. 472-3, and distinctly affirmed on appeal in *Foster v. Mora*, 98 U. S. 427. The series of the principal California cases on the point will be found cited in *Bissell v. Henshaw*, 1 Sawy. 565 *et seq.* It is true that in *Beard v. Federey* there was no final decree of confirmation of the opposing grant. But in

Mora v. Foster there were both a decree of confirmation and a final survey and location of the adverse grants. It was in all respects, including the character of the adverse grant by Pico, confirmed, like the present case. The grant to De Celis was also like that in *Workman's Case*, 1 Wall. 745, and *Jones' Case*, Id. 766. And the claim for the mission in that case was presented by the bishop for confirmation in the same petition as was the land patented to the bishop in this case. If one patent is conclusive record evidence in an action at law of the proper location of the land, so must another be; and defendants' patent is as conclusive evidence, in such an action, that it is correctly located, so as to exclude these tracts of land, as plaintiff's patent that it is properly located so as to include them. Each patent is the last act in the series of proceedings for confirmation, and the final and conclusive record as to where the title is and as to what it covers. It is the final evidence of the matter adjudged between the United States and the claimant. If it shows no right in the patentee as against the United States, it can show none against another patentee of the United States. If there is an error in the description, or location, it must be remedied, if it can be remedied at all, elsewhere. Besides, the plaintiff's survey and location were made and became final under the act of 1860. If it was erroneous, the confirmees of defendants' grant had an opportunity under that statute of correcting it. If they did not embrace that opportunity, the failure to do so was owing to their own laches, and the implication to be derived from the decision of the United States supreme court in *Rodrigues v. U. S.* 1 Wall. 582, is that they are bound by the result. So, also, even had both patents covered the land, the origin of the claim confirmed to plaintiff's grantor was long prior to that confirmed to defendants. See *Henshaw v. Bissell*, 18 Wall. 268-9. But it is not necessary to consider what the rights of the parties would be had both patents embraced the lands. It is enough for this case that the final and conclusive record of defendants' title excludes the land, while that of plaintiff's includes it. In my judgment, the public interests and public policy demand that the principle of the conclusiveness of the patent in collateral proceedings established in the cases referred to, and followed to its logical conclusion in this case, should be rigidly adhered to. The security of titles and the public peace require that confidence should be reposed in the action and records of the judicial tribunals of the country, and in the public records and official action of other public officials acting within the

scope of the jurisdiction conferred upon them by law; and the patent, in the class of cases now in question, is the final record of the judgment of those tribunals and public officers, to whom alone has been committed the jurisdiction to ascertain and determine the matters set forth in the patent.

There must be findings and judgment for plaintiff for the several small tracts of land described in the patent to Archbishop Alemany, being the same described in defendants' third supplemental answer, and for the defendants as to the other lands included in the description contained in the complaint. And it is so ordered.

UNITED STATES *v.* DE VISSER, Ex'x, etc.

SAME *v.* TURNURE.

(*District Court, S. D. New York.* February 20, 1882.)

1. CUSTOMS DUTIES—WAREHOUSE BONDS—RIGHTS AND LIABILITIES OF SURETIES.

Sureties in warehouse bonds given to the United States, under section 2964 of the Revised Statutes, have the same rights and liabilities as ordinary sureties, except as modified by the special laws and regulations concerning the collection of revenue.

2. WAREHOUSE BONDS, HOW INTERPRETED.

Warehouse bonds must be interpreted in reference to the statutes and authorized regulations in force belonging to the warehouse system, and in so far as by design or necessary effect they modify the ordinary rights of the sureties, they are controlling, and to this extent must be regarded as parts of the contract of suretyship.

3. SAME—STATUTES, HOW CONSTRUED.

Statutes not designed to affect the rights and liabilities of third parties, but only to guide the officers of the government in the performance of their duties, are to be construed as directory to them only, and as not creating any obligation to sureties, or forming any part of their contract.

4. SAME—SALE OF ABANDONED GOODS.

The provision in the act of August 5, 1861, (12 St. at Large, p. 293, § 5; section 2971, Rev. St.,) that warehoused goods, not withdrawn within three years, "shall be deemed abandoned to the government and sold," etc., was not designed merely for the security of the government, and to recover its duties in the particular case, but to secure in all cases, so far as possible, the prompt payment of duties within three years, and for this end to cut off peremptorily, after that period, the right of any person to pay the duties and withdraw the goods. Until the amendment of July 28, 1866, (14 St. at Large, p. 230, § 10,) the policy thus enacted involved a forfeiture of any surplus value from the sale. The sale of the goods by the government, as directed, is an incident of the abandonment declared by the act, and an inseparable part of the proceeding.

5. SURETY—RIGHTS DEFINED.

A surety's ordinary right to pay the debt and take possession of the goods at the end of three years, is, therefore, cut off by the act, and his right to pay any deficit, and proceed for indemnity against his principal, is also suspended until after the sale.

6. REMEDY BY SUIT UPON THE BOND.

The proceeding by abandonment and sale is a substitute for the ordinary remedy upon the bond after the lapse of three years. Immediate suit by the government upon the bond, before sale, would involve such inconsistencies that the common-law remedy must be deemed suspended by necessary implication until after the sale of the goods.

7. RIGHT OF PAYMENT AND SUBROGATION—WHEN CUT OFF.

Until after such sale the surety in a warehouse bond has at no time any right of payment, of subrogation, or suit for indemnity against his principal, and his risk continues necessarily till that time. As the statute of 1861 forms in legal effect a part of the bond for the purpose of cutting off his ordinary right of payment and subrogation, and of terminating his risk at the end of three years, it must also be held to form a part of the contract for the purpose of fixing the time when the suspension of his ordinary rights shall cease.

8. CONTRACTS OF SURETIES, HOW INTERPRETED.

Contracts of sureties are interpreted *strictissimi juris* as respects the subject-matter or the duration of their risk, and any change in either, without the sureties' assent, operates as a discharge.

9. SALE OF ABANDONED GOODS.

The statute of 1861 directing a sale according to the prescribed regulations of the treasury department, the regulations so established providing for quarterly sales, and the sale of the abandoned goods at the next sale after three years, are all material parts of the surety's contract, because they fix and determine the duration of his risk.

10. SAME—POSTPONEMENT—SURETY DISCHARGED.

Where, upon such goods being advertised for sale at a regular quarter-day, pursuant to the statute and regulations, the secretary of the treasury, at the request of a purchaser of the goods in bond, intervened by order, and directing a postponement of the sale until further orders without the surety's consent, *held*, that the latter was discharged. *Seem* mere delay by the officers of the government in selling as directed would not discharge a surety, the government not being answerable for mere laches of its officers.

11. SAME—EFFECT OF MERE DELAY.

Mere delay by a creditor in disposing of his securities, unless specially requested by the surety to proceed, is no defence; if so requested, it is a defence only to the extent of the damages proved.

12. SAME—IMPORTER NOT DISCHARGED BY POSTPONEMENT.

The importer being liable as principal, and not being in the situation of a surety having a right of indemnity against any other principal, *held* not discharged by the postponement of the sale.

S. L. Woodford and W. C. Wallace, for plaintiff.

S. A. Blatchford and Dudley Phelps, for defendants.

BROWN, D. J. The above actions are brought to recover duties upon a warehouse bond executed on June 26, 1871, by Simon De Visser, as principal, and L. Turnure, as surety. The bond recites

that the principal had on that day entered at the port of New York 100 bales of imported cinnamon, under the laws of the United States providing for the warehousing of merchandise in bond, and was conditional that the bond should be void "if within one year the goods should be lawfully and regularly withdrawn on payment of duties and charges, or if, after one year, and within three years, they should be withdrawn on like payment, with 10 per cent. additional, or if within three years they should be so withdrawn for actual export beyond the United States; otherwise to remain in full force."

The cinnamon, consisting of 9,364 pounds, was imported by De Visser for Townsend, Clinch & Dyke. It was sold to them in bond at 10 cents per pound; was transferred to them shortly after importation, and a memorandum thereof made on June 21, 1871, upon the withdrawal ledger of the custom-house.

None of the cinnamon having been withdrawn, nor any of the duties paid, the goods were advertised for sale by the collector on the nineteenth of July, 1876, as "abandoned goods." This sale was postponed by the collector, without the knowledge or consent of the defendants, upon the receipt of the following letter from the secretary of the treasury:

"TREASURY DEPARTMENT,

"WASHINGTON, D. C., July 18, 1876.

"*Collector of Customs, New York*—SIR: Mr. Solomon Townsend, representing the late firm (in liquidation) of Townsend, Clinch & Dyke, has made personal application to the department for leave to export certain 100 bales cinnamon, marked 'C. J.,' which appear upon the catalogue of goods to be sold by your order on the 19th inst., as lot No. 254.

"The department declines at present to entertain the said application, but, upon the further request of Mr. Townsend, hereby authorizes and directs you to withdraw said lot from sale, and to retain the same in your custody until further advised by the department, provided the interests of the government will not be prejudiced thereby.

"It is understood by the department that the continued possession of the goods, together with security offered by the bond given on the warehouse entry, will be amply sufficient to protect the government from loss by reason of the temporary withdrawal of said cinnamon from public sale, as hereby authorized.

"Please report to the department your action in the premises.

"Respectfully,

LOT M. MORRILL, Secretary."

The cinnamon was thereafter sold by the collector at a similar sale on October 17, 1877, realizing \$573.50. The duties, at the rate of 20 cents per pound and 10 per cent. *ad valorem*, were liquidated on August 3, 1871, at \$1,935.90, which, after adding penalty and

charges, and deducting the sum realized on the sale, would leave a deficiency, including interest to this date, of \$2,332.25, for which sum the plaintiff asks judgment.

By the act of August 6, 1846, (9 St. at Large, 53,) it is provided that goods so warehoused shall "be kept with due and reasonable care, at the charge and risk of the owner, importer, etc., and subject at all times to their order, upon payment of the proper duties and expenses," etc.

By act of July 14, 1862, (12 St. at Large, p. 560, § 21,) as amended by act of July 28, 1866, (14 St. at Large, 330; Rev. St. §§ 2971-2,) it is provided that all goods remaining in warehouse beyond three years shall be regarded "as abandoned to the government, and shall be sold under such regulations as the secretary of the treasury may prescribe;" and that, "after deducting duties, charges, and expenses, any surplus may be paid to the owner." Article 138 of the regulations of 1868, and article 764 of 1874, provide that such surplus *must* be paid to the owner, etc. See *Supervisors v. U. S.* 4 Wall. 425, 445-7.

By article 134 of the treasury regulations issued October 30, 1868, it is provided that "goods duly bonded, remaining in warehouse without payment of duties for the space of three years from importation, must be in the same manner sold at the first quarterly sale thereafter, distant not less than three weeks."

By article 135, quarterly sales are directed to be had between the first and tenth of each January, April, July, and October. Article 136 contains directions for an appraisal of the goods before sale, and many minute particulars to be observed in regard to cataloguing and advertising the property to be sold. These provisions were in force when the bond in suit was executed; and similar provisions are found in articles 761 and 762 of the regulations issued January 1, 1874, under which the sale in 1877 was made, and many of them are now incorporated in section 2973 of the Revised Statutes, and in previous laws.

The defendants claim that the bond given by them is to be construed in reference to these provisions of the statutes and treasury regulations; that upon the sale of the goods by De Visser to Townsend, Clinch & Dyke, and notice thereof to the government, De Visser became, like Turnure, but a mere surety for the payment of the duties; and that by the postponement of the sale by order of the secretary of the treasury, in July, 1876, the government, in legal effect, released the sureties and elected to look to the goods for payment, and that the defendants were thereby discharged.

Aside from the statute providing that the goods "shall be deemed abandoned to the government and sold" after three years, (section 2971,) it is manifest that the delay and postponement of the sale constitute no ground of defence; for, apart from this statute, the case would be simply that of delay by a creditor in enforcing his remedy upon collateral securities, and this, it is well settled, is no defence to a surety, since he has had, during all the period of delay, the legal right, if he choose, to pay the debt, and take and enforce the securities himself. Unless, therefore, he has previously intervened, and given distinct notice requiring an immediate resort to such securities, he has no cause of complaint; if he has done that, and any subsequent loss arises through neglect to proceed, that will be a defence *pro tanto* only to the extent of the damages proved. *King v. Baldwin*, 2 Johns. Ch. 559; *Schroepell v. Shaw*, 3 Comst. 457; *Clark v. Sickler*, 64 N. Y. 231; *Hunt v. Purdy*, 82 N. Y. 486; *Black River Bank v. Page*, 44 N. Y. 453; *Remsen v. Beekman*, 25 N. Y. 552. In this case there was no proof of any notice or request to sell, nor of any special damage arising from the delay.

The defence rests wholly, therefore, upon the provision of the statute of 1861 which declares that after three years the goods, if not withdrawn, "shall be deemed abandoned to the government, and shall be sold under such regulations as the secretary of the treasury shall prescribe." In this case the goods were not "sold" in accordance with the "regulations prescribed," nor until several years afterwards; and one of the causes of delay was a postponement specially ordered by the secretary of the treasury.

The questions involved are whether this statute, and the regulations under it, formed by implication of law any part of this bond; and if so, whether the postponement of the sale by special order of the secretary of the treasury beyond the time provided by the statute and regulations involved any such alteration of the implied terms of the contract as to discharge the surety. For it is only in consequence of some alteration in the express or implied terms of the contract, in an essential particular, that the surety can claim to be discharged; and if the postponement of the sale in this case had no bearing upon the extent or duration of the surety's risk, and no other result than mere delay in realizing upon the goods held as security for the duties and charges, then the postponement would not constitute any defence to the surety, any more than it would in the absence of any statute on the subject.

In examining these questions it is assumed that the ordinary principles of the law of principal and surety apply to this case. If there is anything peculiar in the situation of custom-house sureties, or in the law applicable to them, it must result from the form of the bonds themselves, or from the special laws designed to affect the rights and liabilities of the parties to them. The bond in suit was given under the provision of the statute now embodied in section 2964 of the Revised Statutes, which provides that goods may be entered for warehousing, "subject to order, on payment of the proper duties and expenses, to be secured by a bond, with *surety* to the satisfaction of the collector, in double the amount of the duties, in such form as the secretary of the treasury shall prescribe." Different forms of these bonds have been prescribed from time to time. The present was the form in use at the time it bears date. Treas. Reg. art. 31 of 1868. Though having several alternative conditions, it is in substance a bond for the payment of duties and charges, unless the goods shall be duly exported within three years; and, upon forfeiture, only the amount of duties and charges could be collected upon it. *Westray v. U. S.* 18 Wall. 330.

The statute, in requiring a "surety," requires only an obligor having the rights and liabilities of any ordinary surety, except in so far as they are modified by the special laws and regulations applicable to the subject. Except as thus modified, the rights of sureties in such bonds given to the government are the same, and are governed by the same rules of law that pertain to contracts of suretyship between individuals. "There is not one law for the former and another law for the latter." Per *Swayne, J., McKnight v. U. S.* 98 U. S. 186. The inquiry in any such case must be, what are the general rules of law applicable to the particular contract, and to what extent, if at all, have these rules been modified by the special laws and regulations concerning the collection of the revenue?

1. In considering the statute of 1861, declaring that after three years goods not withdrawn "shall be deemed abandoned to the government and sold," the first inquiry is whether this statute is to be deemed to be in effect any part of the bond, or to create any obligation of the government to the surety; or whether it is simply directory to the officers of the government, in the nature of private instructions from a principal to his agent, designed only for the latter's guidance in the performance of his duties.

This statute, together with the regulations above recited, form a part of the system of laws regulating the entry of goods for ware-

housing, and these laws are referred to in general terms in the bond itself. The bond cannot in fact be understood or applied without a reference to these laws. As above observed, it is not even conditioned, in express terms, for the payment of duties, although that is its legal effect, but only for "withdrawal of the goods upon payment of duties," etc. Being given under the provisions of law establishing the warehouse system, the bond must be interpreted in reference to the statutes and regulations in force concerning that system; and in so far as any of such statutes, either by design or necessary effect, are found to modify the ordinary rights of suretyship in a bond like the present, they are controlling, and must be held to modify those rights accordingly. 2 Story, Const. (3d Ed.) 232; *U. S. v. Kirkpatrick*, 9 Wheat. 720, 734; *People v. Pennock*, 60 N. Y. 421, 426. In this sense, and to this extent, statutes and regulations which are designed to affect the rights of parties to the contract must be regarded as parts of the contract, otherwise the statute would be *pro tanto* annulled. In the case last cited it is said, per *Allen, J.*, (p. 426:) "The condition of the bond must be construed, and the liabilities of the sureties limited, in reference to the statutes making the supervisor a custodian of public moneys. These statutes make a part of the contract of the surety."

But, on the other hand, statutes which are not designed to affect the rights or liabilities of third parties, but are designed only to direct the officers of the government in the performance of their duties for its own protection and security merely, are construed as directory to them only, and as not creating any obligation to the surety in the bond, nor as forming any part of the contract of the government with him. *U. S. v. Kirkpatrick*, 9 Wheat. 720, 736; *U. S. v. Van Zandt*, 11 Wheat. 184; *U. S. v. Nicholl*, 12 Wheat. 505, 509; *Locke v. Postmaster Gen.* 3 Mason, 446, 450; *Dox v. Postmaster Gen.* 1 Pet. 318, 325; *U. S. v. Boyd*, 15 Pet. 187, 208; *Jones v. U. S.* 18 Wall. 662; *Osborne v. U. S.* 19 Wall. 577, 580; *Board of Sup'rs v. Otis*, 62 N. Y. 88, 93, 95. These cases are all of them cases against sureties upon bonds given for the faithful performance of their duties by collectors, postmasters, or other receivers of public moneys, who were required by law to render certain periodical accounts, upon which suits might be brought for any deficiencies, and in some of the cases the officers were directed to be removed. In the leading case on the subject, *U. S. v. Kirkpatrick*, 9 Wheat. 720, *Story, J.*, says: "These provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its officers. They are merely directory to such officers, and constitute no part of the contract with

the surety," and therefore it is held that any laches of the government officers in the performance of such directory duties is no defence to a surety, since it does not violate any duty owed to him, or any of the implied terms of the contract with him. And this is the principle of all that class of cases.

But if the statute of 1861 was not designed to be merely a direction to the government officers, but was designed directly to affect, or by its operation does necessarily directly operate upon and affect, the rights of the sureties in warehouse bonds, then it cannot be held to be merely directory, like those in the cases last cited, but must form, by implication of law, a part of the contract; since otherwise the statute would be rendered nugatory. That such is the intention and the necessary effect of the statute of 1861 seems to me to be clear from the language of the act, and from the presumed intention of it to be gathered from the various statutes on the subject, and from a consideration of what would be the rights of the parties in the absence of any similar statutory provisions.

Aside from any statutory provisions of this character, the bond in question, upon the lapse of three years without withdrawal of the goods and payment of the duties, would be forfeited, and an action at law would at once lie upon it against the principal and surety, without reference to the goods still in the possession of the government. The latter would also have the right, at its election, to proceed first to realize what it might from a sale of the goods, on due notice to the parties interested, paying the surplus, if any, to the owner; and if a deficiency resulted, to recover such deficiency afterwards by action upon the bond. In either case the principal would have a legal right to pay the debt, *i. e.*, the duties and charges, at any time after three years, and before a sale of the goods, and at the same time take the goods into his possession; and the surety also, at any time before payment by the principal, would have the same right to pay the debt, and be subrogated to all the rights of the United States to the goods in its possession, and to its right of action against the principal; and this right, between individuals, could be enforced by suit. These are familiar principles in the law of suretyship. *Johnson v. Zink*, 51 N. Y. 336; *Hayes v. Ward*, 4 Johns. Ch. 123, 131; *Marsh v. Pike*, 10 Paige, 595. Hence, if there was no statutory provision of this kind, the time for the payment of duties on all warehouse goods would be practically considerably enlarged, since payment of duties could always be safely deferred until the government was ready to effect a sale. To avoid this practical extension

of the period for payment of duties, and to secure prompt payment within the time intended to be limited by the warehouse acts, some provision of this kind was necessary. Moreover, the handling of the vast amount of warehoused goods, the orderly collection of the duties upon them through the proper subordinate officers, and the necessity of a transfer of the goods to different hands for the purpose of a government sale,—in other words, the conveniencies of the public business,—also required that a period be fixed when the importer's right to pay the duties and to control the goods should cease, and when the government might proceed to sell without inconvenience and without question. The various acts passed since the adoption of the warehouse system show, I think, that the purpose of the statute in question was not only for convenience in the transaction of the public business, but especially, also, to secure the prompt payment of duties within the prescribed period.

The act of August 6, 1846, (9 St. at Large, 53,) establishing the warehouse system, allowed but one year for the payment of duties, or for re-exportation without payment; and it provided that in case any goods should remain in public store beyond *one* year without payment, they should be sold by the collector, "on due public notice given in the manner and for the time prescribed by the general regulations of the treasury department, and the proceeds of such sale, after deducting storage, charges, expenses, and duties, should be paid over to the owner, importer, consignee, or agent." These regulations applied alike to goods deposited in public store for want of due entry, and to those entered for warehouse under the act. By act of March 3, 1849, (9 St. at Large, p. 399, § 5,) a period of two years was allowed for exportation. By the act of March 28, 1854, (10 St. at Large, p. 271, § 4,) it is provided that "all goods entered for warehousing under bond may continue in warehouse, after payment of duties thereupon, for a period of *three* years from the date of original importation, and may be withdrawn for consumption on due entry and payment of the duties and charges, or, upon entry for exportation, without the payment of duties, at any time within the period aforesaid; in the latter case the goods to be subject only to the payment of such storage and charges as may be due thereon." By the act of August 5, 1861, (12 St. at Large, p. 293, § 5,) it is provided that "all goods thereafter deposited in bonded warehouse, if designed for consumption in the United States, must be withdrawn, or the duties paid, within *three months* after the same are deposited," or "within *two years*, upon payment of the duties, with 25 per cent. additional," or

may be withdrawn for exportation at any time before the expiration of three years; "*such goods, if not withdrawn in three years, to be regarded as abandoned to the government, and sold under such regulations as the secretary of the treasury may prescribe, and the proceeds paid into the treasury.*" This is the first enactment of the specific provision here considered. By the act of July 14, 1862, (12 St. at Large, p. 560, § 21,) it was provided that goods "thereafter deposited in bonded warehouse must be withdrawn or the duties paid within *one year,*" or withdrawn for exportation within three years, and that "any goods remaining in public store or bonded warehouse beyond *three years* shall be regarded as abandoned to the government, and sold under such regulations as the secretary of the treasury may prescribe, and the proceeds paid into the treasury." By the act of July 28, 1866, (14 St. at Large, p. 330, § 10,) the last provision of the act just quoted was "*amended so as to authorize the secretary of the treasury, in case of any sale under the said provision, to pay to the owner, consignee, or agent of such goods the proceeds thereof, after deducting duties, charges, and expenses, in conformity with section 1 of the act of August 6, 1846,*" above referred to; and by act of March 14, 1866, (14 St. at Large, p. 8, § 1,) it was provided that "goods may be withdrawn for consumption until the expiration of *three years*, on payment of the duties and charges, and 10 per cent. additional." These last provisions are embodied in substance in sections 2971, 2972, 2973, of the Revised Statutes.

From this review of the various acts upon this subject it will be seen that by the statute of 1861, which first enacted the provision in question, the abandonment of the goods to the United States was made complete for all purposes, if not withdrawn within three years; so that, upon a sale of them by the government, the owner had no longer any right even to the surplus, which had been previously secured to him by the act of 1846. By the act of 1866 this right of the owner to the surplus was restored; but the provisions for abandonment and sale were, in other respects, unchanged.

It cannot be doubted, I think, that one of the purposes of the act of 1861 was to secure the payment of the customs dues within three years, by making it for the owner's interest to pay the duties within that period. To secure this end, in the case of all warehoused goods, it was designed by this enactment to cut off peremptorily, after the lapse of that time, the right of any person, whether importer or owner or surety, to pay the duties and withdraw the goods. If such a design was partially indicated by the general provisions for sales

in the act of 1846, it was made more certain and emphatic by the act of 1861, which declared that the goods should, after three years, be deemed "abandoned to the government," and worked a forfeiture of any surplus. That act was passed amid the exigencies of the war; and the general purpose of the act to insure the prompt payment of duties is shown by other provisions of the same section of the act, which reduce the time for the payment of duties, without penalty, to three months, and add thereafter an increased penalty of 25 per cent.

The act must, therefore, be held to have been designed to cut off the right of the surety as well as of the principal, which they would have had but for some statutory provisions of this kind, to pay the duties and withdraw the goods after the lapse of three years, and at any time before a sale. It has been so construed in the regulations of the department, and such, I think, must be held to be its proper legal effect. Article 141 of 1868, and article 767 of 1874, of the treasury regulations, forbidding such withdrawal, are based upon this view of the statute. To this extent, therefore, the statute of 1861 enters into and forms a part of the implied terms of this bond. It cuts off the surety's right of payment and subrogation, which, but for some statutory provisions of this character, he would have had.

The statute cannot, therefore, be held to be a merely directory one, like that referred to in the case of *U. S. v. Kirkpatrick*, and others of a kindred character, above cited, which is addressed to the officers of the government merely for their own guidance in the performance of their duties. It is more than that, because it is designed to cut off, and does cut off, the surety's rights of payment and subrogation, which are ordinarily incident to his very contract of suretyship. It was not designed to provide for a sale of the goods merely for the security of the government, and merely to recover its claims in the particular case of any goods being left over after three years; for the government had that right already without this statute, under the act of 1846; and, if that were the only design of the act of 1861, the provision that the goods "shall be deemed abandoned to the government" would have been neither necessary nor appropriate, and on such a construction the statute would in effect become mere surplusage, of no use or effect. Its purpose was rather to prevent, so far as possible, any goods being left over at all, by enacting such a policy in regard to them as should induce all importers to withdraw their goods within the prescribed period; and for this purpose the power of every person to withdraw the goods upon

payment of the duties was intended to be cut off immediately after the lapse of three years, and until 1866 any surplus value was forfeited to the government.

The tendency and effect of this statute, enforced according to this construction, which involves some loss to the owner at best, through a sale of his goods under unfavorable circumstances, has undoubtedly been to secure payment of duties within three years on the vast majority of warehouse entries. It is of more consequence to the government to secure this general result, than to obtain a somewhat earlier payment of duties on the few goods which, under this policy, are still left over after three years, which might be obtained by consenting to their withdrawal on payment of duties before actual sale; and such a right of withdrawal on payment after three years, was, therefore, intended to be prohibited by this act.

2. The statute of 1861, prior to the amendment of 1866, was thus to some extent punitive. Though the forfeiture of any excess upon a sale is now remitted, the general purpose of the act cannot be deemed thereby changed, or its effect in cutting off the right of withdrawal after three years, on payment of duties by either principal or surety, repealed. These must remain the same.

The necessary logical and practical result of the enforcement of these provisions must be that the government's right of action upon the bond is suspended until the sale of the goods. If such a suit could be brought before sale the importer or surety, on being sued, might pay at once; and, in that case, the goods would not be sold, and the "proceeds applied to the payment of the duties, charges, and expenses," as provided by the act of 1866. This is, perhaps, rather a verbal than a substantial criticism. But it is certainly contrary to the intent of this act that the government should sue for and collect the duties, and still keep the goods; nor, after collecting the whole duty by suit, could it then deliver up the goods to the owner without violating the very purpose, policy, and object of the statute in declaring that the goods should be "deemed abandoned and sold." If that could be done, the payment on suit would become merely a mode of withdrawal of the goods by the owner after three years, which is prohibited. Nor, prior to the amendment of 1866, (when there was no provision for returning to the owner any surplus, or even any proceeds of the sale, if the duties were collected first,) can it be supposed that it was the intent of the act that the duties might first be collected in full by suit on the bond, and that then a double payment, either wholly or in part, might be exacted through a sale of the

goods by the government for its own benefit, and without any returns to the owner.

There is no reasonable alternative, therefore, but to hold either that the goods may be withdrawn on payment of duties after three years at any time before sale, which would seem to be directly contrary to the provisions of the statutes, and which would revolutionize the practice of the department, or else that this right is designed to be absolutely prohibited by the act of 1861, as a matter of policy for the general interests of the government, and that, as a consequence therefrom, the right of suit on the bond is necessarily suspended until after a sale of the goods. The latter construction is, I think, the only one consistent with the language of the statute, and with its apparent intent, as shown by the several acts on the subject above quoted.

The provision for the sale of the goods, moreover, cannot be separated from the clause declaring them "abandoned to the government." The sale directed by the statute is evidently designed to be associated with, and consequent upon, the abandonment previously declared. It is, therefore, a part of the statutory proceeding adjudging the abandonment of the goods; and the ordinary rights of either party incompatible with the course of procedure so enacted, including any subsequent payment, or withdrawal of the goods, or suit by the government before sale, must be deemed superseded by it.

The case is analogous to that of *Looney v. Hughes*, 26 N. Y. 514, where suit was brought against the sureties of a town tax collector, upon a bond conditioned generally for the faithful performance of his duties. A statute required the county treasurer to issue a warrant to the sheriff to collect from the collector any deficiency in his returns; and, if uncollected, to report to the supervisors the amount remaining due, who were ordered by statute forthwith to put the bond in suit and to recover the sum due. *Selden, J.*, says, (p. 517,) that upon these statutory provisions "a recovery upon the bond according to the rule of the common law" (*i. e.*, by suit immediately on the collector's default) "appears inadmissible." "Can an action be commenced to recover this sum before the amount is ascertained, or before it is ascertained that any sum whatever will remain uncollected? I think, clearly not. * * * The same instrument can hardly bear two different constructions, and be subject to two different rules of damages for the same identical breach. It would seem, therefore, that no action could be maintained upon the bond until after the issue and return of the warrant authorized by section 13."

The effect, therefore, of the statute of 1861 is to provide a mode of procedure as to goods not withdrawn within three years, which shall be a substitute for the ordinary course of proceeding by either party upon default in the condition of a warehouse bond like the present. The statute prescribing this substituted procedure applies as though it formed a part of the bond, and this substitute is exclusive of any other proceeding, so long as there are goods remaining unsold, because any other course would require acts either directly contrary to the "abandonment" declared, or would involve inconsistencies and incongruities which seem clearly inadmissible. The common-law remedy is, therefore, suspended until after the sale by the "necessary implication" of the statute of 1861, and the case is within the exception to the ordinary rule of construction that a statutory remedy is to be deemed cumulative only, "unless the common-law remedy is negatived in terms or by necessary implication." 2 Inst. 200; *Crittenden v. Wilson*, 5 Cow. 165; *Clark v. Brown*, 18 Wend. 220; *Stafford v. Ingersol*, 3 Hill, (N. Y.) 41; *Dudley v. Mayhew*, 3 N. Y. 9. It is as though the parties had stipulated in the bond that, in case of default, their remedies, if goods remained on hand, should be first sought in this way, and in no other; the right of action on the part of the government being thereby suspended until sale, and the right of payment and subrogation by the surety to the possession of the goods being also cut off. The surety's obligation becomes, in effect, as in the case of *Looney v. Hughes*, an obligation to make good any deficiency that may arise upon a sale to be had in pursuance of the statute; and such, also, is the provision of the treasury regulations, (article 138 of 1868; article 764 of 1874,) which direct that from the proceeds of sale shall be paid the duties, charges, expenses, etc., and that "the balance will be collected upon the warehouse bond by suit, if necessary;" and it is for such a deficiency that this suit has been brought.

3. The result is that under this statute of 1861 the surety has no right of subrogation, and can neither pay the debt nor resort to his principal for indemnity until after the sale has been had as provided by the statute. He could not discharge the debt and withdraw the goods during the three years, because the express term of credit to the importer or his vendee lasted for that whole period. Under this statute, and the regulations issued in pursuance of it, he could not do so at any time after the three years and before the sale, because immediately upon the lapse of the three years the statute comes in and declares that the goods "shall be deemed abandoned and sold."

Until after the sale, therefore, there is never a moment when the surety has any power to do anything for his own protection, either by payment, subrogation, or suit against his principal. His risk, therefore, necessarily continues up to that time. It is the sale which first puts a period to his risk; until then his hands are tied, and he can take no steps against his principal for his indemnity.

In this point of view, therefore, the provision for the sale in the statute of 1861 becomes of vital importance to the surety, since it is that which determines the duration of his risk, and when it may be terminated. The surety is entitled to the benefit of the provision for the sale in terminating his risk, because it is a part of the same statute which enters by necessary implication into his contract, so as to cut off or suspend his ordinary right to end his liability by payment and subrogation immediately on the lapse of three years; and if the statute forms a part of the bond for this purpose, then it must also form a part of it for the purpose of fixing the time when this suspension of his ordinary rights shall cease. The same statutory provision cannot be both in the contract and out of it at the same time. The provision for the "sale" is an inseparable part of the provision for the abandonment of the goods to the government; and if the surety's ordinary rights to terminate his risk by payment and subrogation are cut off by the latter, he must be entitled to whatever protection, in limiting the duration of his risk, the clause providing for a sale may afford him; and this provision enures to his benefit as a part of the implied terms of the bond. The provision for a sale in this statute is, therefore, as much "an obligation owing directly to the surety" as the provision for an abandonment of the goods to the government is an enactment operating directly to defeat his ordinary rights. The postponement of the sale was, therefore, a violation of a duty owed to the surety under this bond, and involved a prolongation of his risk beyond the period contemplated by law and by the implied terms of his contract, upon the observance of which he had a legal right to rely.

Any different construction seems to me to be unreasonable, and to place sureties in a most anomalous position. Warehouse bonds with such sureties are now required by law (section 2964) to the amount of nearly \$100,000,000 annually at this port alone. While requiring sureties to this vast extent, it seems scarcely reasonable to hold that the law was intended to cut off their ordinary right of self-protection through payment and subrogation at the end of three years, without any provision as a substitute upon which the sureties might

have a legal right to rely in fixing some time when their risk might be terminated. Nor can it be supposed that sureties would be required by law to enter into obligations to such a vast extent upon risks which might be unlimited in duration, and which they would never have any power to bring to a close. No prudent man could be expected to enter into such an obligation as surety for another; and no unnecessary construction of the statute should be given which would lead to that result. This statute, and the regulations under it, do, upon their face, provide approximately such a period for the termination of the surety's risk, by sales prescribed to be had not long after the lapse of the three years; and thereupon any further risk of sureties could be immediately terminated by payment of the debt, and suit against their principals. These provisions, while valuable to the government, afford also reasonable protection to sureties; they are such as sureties would naturally rely upon, and are such as I think the law designed to give them a right to rely upon as a part of their contract; so far, at least, as that the time of sale should not be deliberately postponed without their assent. If the sale may be indefinitely postponed at the option of the secretary of the treasury, and the surety be still held, then these provisions, in the language of the court in *U. S. v. Becker*, 21 Wall. 656, "instead of affording a limitation and a safeguard to the surety, might prove but a delusion and a snare, and subject him to liabilities which he could not have foreseen, and to the hazard of which he would not willingly have exposed himself."

I do not perceive any interest which the government can have in upholding such a power of indefinite postponement of sales. If it has any such interest it can be provided for among the regulations which the statute authorizes to be prescribed. When that is done, sureties will know what to expect if they enter into such obligations thereafter. Until then their risk cannot be thus indefinitely prolonged.

In this case the postponement was not apparently for any interest of the government, but was given as a favor to third persons, then owners of the goods, who had requested it of the secretary. Such a favor could not be granted at the expense of the surety, by prolonging his risk, without his assent.

A surety's contract is in this respect *strictissimi juris*. Any prolongation of his risk, or change in the subject-matter of it, is an alteration of the contract in an essential particular; and if made

without the surety's consent discharges him from liability; and this applies equally to the United States, and to any alterations of the contract made through the acts of its officers. *U. S. v. Hillegas*, 3 Wash. C. C. 70; *U. S. v. Tillotson*, 1 Paine, C. C. 305; *U. S. v. Boecker*, 21 Wall. 652; *Miller v. Stewart*, 9 Wheat. 681; *King v. Baldwin*, 2 Johns. Ch. 560; *Grant v. Smith*, 46 N. Y. 93; *U. S. v. Bostwick*, 94 U. S. 66; *Cooke v. U. S.* 91 U. S. 396.

If the secretary of the treasury had by express order, at the owner's request, extended the period of three years within which to pay the duties without the surety's consent, it cannot be doubted that such an extension of time would have discharged the surety, because it extended the duration of his risk. *U. S. v. Hillegas*, *supra*. By the regulations (article 158 of 1868; article 799 of 1874) such extensions of time are to be granted only upon the "concurrence of the surety." Or, had the secretary directed the delivery of the goods within the three years to the owner without payment of the duties owing upon them, and they were delivered accordingly, that also must have been held to be a discharge of the surety to the extent of the value of the goods released, as in cases between private individuals. "The United States," says the chief justice, in *U. S. v. Bostwick*, 94 U. S. 66, "when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens in the same circumstances will be implied against them."

An extension of the time of payment discharges a surety, because it prolongs his risk by postponing his right of payment and subrogation, and by depriving him of his right of immediate recourse by suit against his principal for indemnity at the time when the debt was originally due. The contract by such extension is varied to his prejudice. *U. S. v. Hillegas*, 3 Wash. C. C. 76; *King v. Baldwin*, 2 Johns. Ch. 560; *Warner v. Beardsley*, 8 Wend. 201; *Brown v. Williams*, 4 Wend. 360, 367.

The voluntary and deliberate postponement of the sale in this case effected precisely the same result, and operated in the same manner upon the surety's rights, as an extension of credit would have done. It necessarily prolonged his risk and suspended his right to proceed for his indemnity for three months, until after the next regular sale; and it resulted in a prolongation of fifteen months. As respects the surety, the postponement was precisely equivalent to an extension of credit to the owners of the goods until the next sale, and should, therefore, be held to discharge the surety in the same manner.

Under the authorities above cited, (*U. S. v. Kirkpatrick, etc.*), mere laches by government officers in effecting a sale would not avail as a defence, but this affirmative postponement of the sale by the special order of the secretary of the treasury was not laches, any more than an express extension of credit would have been, nor was it an act in pursuance of "prescribed regulations." It was an isolated, independent order, contrary to those prescribed regulations." If one deliberate postponement can be upheld without the surety's consent, the sale may be postponed indefinitely, his risk be indefinitely extended, and his liability to loss through the insolvency of his principal be indefinitely increased. Such a liability to an indefinite extension of the surety's risk cannot have been designed, and ought not to be sustained, under the warehouse system, which requires sureties to be given to so vast an extent in the commerce of the country; nor can such a possibility be supposed to have been contemplated by the sureties who have entered into obligations under it.

The order of the secretary to withdraw the goods from sale was an absolute one, so far as related to the defendants. It was not made to depend upon their assent, nor was such assent required. That they would remain bound was assumed. "The interests of the government," referred to in the proviso, evidently relate to the goods and to the price to be obtained for them. It cannot be supposed that the secretary meant to submit to the decision of the collector the legal question whether the surety's assent was required or not. However this may be, the sale was postponed by the collector under this order, and the discretion conferred on him by it, and the government must be held bound by its legal consequences.

The result would be otherwise if I could find that at any time before sale the surety had any legal right to pay the debt and be subrogated to the possession of the goods, or any right of immediate suit against his principal; for in that case, the postponement of the sale having no effect upon the surety's immediate rights of payment, subrogation, or suit against his principal, would work no necessary extension of his risk, and therefore no legal injury. But, as the statute in question, and the policy it established, involve a loss of the surety's right of payment and subrogation to the possession of the goods, and the suspension of the government's right of action until after the sale, and consequently a suspension of the surety's right to proceed for his indemnity, I see no alternative but to hold a voluntary postponement of the sale without the surety's assent to be a discharge,

as involving a prolongation of his risk beyond the period contemplated by the implied terms of his agreement.

The case of De Visser, the principal in the bond, is different. It does not appear that upon his sale to Townsend, Clinch & Dike the latter personally assumed to pay the duties, or, if they did, that the officers of the government were apprised of that fact. The government, therefore, had no other principal to look to than De Visser. He was liable for the whole duties as importer, without limitation of time and irrespective of the goods held as security. *U. S. v. Phelps*, 17 Blatchf. 312, 316; *Dumont v. U. S.* 98 U. S. 142, 144; *U. S. v. Cousinery*, 7 Ben. 251; *U. S. v. Westray*, 18 Wall. 322. It does not appear, therefore, that he ever became, even in equity, a surety for any other person as principal to whom he could look for indemnity. The postponement of the sale involved, as respects him, no increase of risk, and no defeat or postponement of any right of recourse against another. His liability to be called on for payment might, upon sufficient facts proved, be postponed in equity, irrespective of the statute, until a sale of the goods had been had; but this equitable right has been observed. The injury to him, if any, would consist solely in delay in disposing of the security; and that alone, without notice from him to sell, or damages proved, is no defence.

Judgment must, therefore, be rendered in favor of the defendant Turnure, and against the defendant De Visser, with costs.

As the questions involved concern the daily transactions of the government to a large amount, I have given to the subject, in the absence of any known adjudications, the consideration which its importance has seemed to demand.

WHALEN v. SHERIDAN.

(Circuit Court, S. D. New York. October 5, 1880.)

1. PRACTICE—BILL OF EXCEPTIONS—RULE OF DILIGENCE.

Poverty or pecuniary embarrassment is not a sufficient ground for a motion for leave to file a bill of exceptions *nunc pro tunc*. It is not an "extraordinary circumstance" such as will defeat the rule of diligence in civil procedure in the federal courts.

2. REVIEW IN FEDERAL COURTS—RULES OF PRACTICE.

The system of review on writ of error established by a statute of the United States is so far different from an appeal under the Code of New York, which provides for the review of rulings excepted to on the trial, that the provisions of the state statutes do not govern proceedings under it.

Motion for leave to file and serve a bill of exceptions *nunc pro tunc*.

Scott Lord, for the motion.

A. B. Herrick, Asst. Dist. Atty., opposed.

CHOATE, D. J. The plaintiff has been allowed to renew his motion (5 FED. REP. 436) to file and serve a bill of exceptions, upon further affidavits; but I am unable to find that the additional facts now stated make out a case of extraordinary circumstances, such as is required under the authority of *Muller v. Ehlers*, 91 U. S. 249, for the exercise of the power of granting the relief asked. Those facts are that after the trial of the cause the plaintiff, being unable to pay to his attorney the fees that were due to him, and which he demanded, the attorney refused to act further for him, although he continued to be the attorney of record for the plaintiff. Another counsel was employed to argue the motion for a new trial, but he did not assume the responsibility of the attorney in the cause, and left for Europe soon after the argument. The plaintiff himself was not aware of the expiration of the time limited for preparing and filing his bill of exceptions, and was absent in other states during part of the time that elapsed between the decision of the motion for a new trial and the suing out of the writ of error; and the preparation of the exceptions was deferred and neglected, under the impression that all the voluminous testimony taken on the trial must be included, which would involve an expense far beyond the plaintiff's means. It was not determined positively by the plaintiff and his advisers to take the case to the supreme court till the idea was suggested that the review should be asked on a single point of law which is presented by the proposed bill. By that time the time limited for filing the excep-

tions had expired. I think it is the result of the affidavits now made, that, while the plaintiff had not entirely abandoned his purpose to go to the supreme court, he yet, mainly from want of means to pay his lawyers, failed to have his case properly looked after, so as to have the necessary measures taken to make his appeal effectual, so far as concerned a review of the rulings upon the trial, in case he should finally be able to make arrangements to prosecute a writ of error.

Like many other cases where poverty leads to the neglect or abandonment of the appointed means of redress for possible wrongs sustained, this case has elements which appeal to the sympathies of the court, but the plaintiff cannot be released in the mode proposed consistently with the rules adopted by the federal courts, not without creating a precedent which will be of the most embarrassing character. The real and only excuse, as it seems to me, that is offered for the neglect of the appointed mode of redress, is, after all, the poverty and financial embarrassment of the plaintiff. If this is allowed to be an "extraordinary circumstance," within the rule declared by the supreme court in *Muller v. Ehlers*, the inquiry will be open in every such case as to the extent of the plaintiff's financial embarrassment. Want of means is, also, easily sworn to, and, in most cases, difficult or impossible to disprove. Thus, the rule of diligence, which, for wise reasons is intended to be rigid, will be wholly broken down. Poverty or pecuniary embarrassment is not recognized as a sufficient excuse for not asserting a legal right where the rules of law require the assertion of that right with diligence. *Hayward v. Nat. Bank*, 96 U. S. 618.

It is urged that section 783 of the New York Code of Civil Procedure, which authorizes the court to relieve a party in an action who has failed to take a proceeding within the time within which by law it must be taken, applies to this case; and it is further urged that, with all the differences of form, an appeal under the Code, which includes and provides for the review of rulings excepted to on the trial, is substantially the same proceeding as a review on writ of error in the federal courts, and that, by section 914 of the Revised Statutes of the United States, the practice of the state courts in such a proceeding, including section 783 of the Code of New York, as applied thereto, is applicable to proceedings under writs of errors. Section 914 of the Revised Statutes only assimilates the practice in the federal courts to that of the state courts "as near as may be." I am still of the opinion expressed upon the former hearing, that the system of review on writ

of error is so far a different system of procedure, established by a statute of the United States, that the provisions of the state statutes do not in any respect govern proceedings under it. The fact referred to, that the rules of the state supreme court still retain the expression "bill of exceptions," (rule 34,) does not, as it seems to me, affect the question, although it may not be exactly true in view of that fact, as stated in my former opinion, that "bills of exceptions" are unknown under the Code of New York.

The point made on the part of the defendant that, after the allowance of the writ of error, the case is pending in the supreme court and not in this court, and that, therefore, this motion, which is in effect a motion to alter the record to be reviewed, should be made in the supreme court and not here, seems to me to have great weight, and to be supported by authority. *Clark v. Hancock*, 94 U. S. 493. It is unnecessary, however, to pass on the question of the power of this court to grant the relief, since I am not satisfied that a case for relief is made out. But, as the plaintiff may be advised to apply to the supreme court, the motion will be denied without prejudice to such application.

NOTE. The rules of the New York Code of Practice have no application over writs of error and bills of exceptions in the United States courts. *Whalen v. Sheridan*, 5 FED. REP. 436. Notwithstanding the rule of court requiring a bill of exceptions to be drawn up within 10 days after the trial, a case may be excepted from its operation when it is just to do so. *Marye v. Strouse*, 5 FED. REP. 494. The power to reduce exceptions taken at the trial to form, and have them signed and filed, is confined, under ordinary circumstances, to the term at which judgment was rendered. *Whalen v. Sheridan*, 5 FED. REP. 436; citing *Muller v. Ehlers*, 91 U. S. 251.—[ED.]

LIEGEOIS v. McCracken.*

(Circuit Court, S. D. New York. February 8, 1882.)

1. PRACTICE—DEMURRER TO COMPLAINT.

A complaint which alleges that the parol contract sued on was valid under the law of the state where it was made and to be performed, and that it was for a good consideration, is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action.

On Demurrer.

An action was brought on a parol contract, made by the defendant in Connecticut with the plaintiff, at the time residing there, but whom the defendant had the year before seduced in the state of California. In consideration of the seduction the defendant promised to pay the plaintiff annually during her life, for her board, the sum of \$500, in monthly payments, and also such sums, not exceeding \$500 a year, as should be necessary for her clothing. Payments were made by defendant for about a year, when he refused further to perform his contract. Such a contract by the laws of Connecticut, where it was made and was to be performed, was a valid contract, and the consideration sufficient in law to sustain an express promise made by the defendant to make reparation for injuries sustained by past seduction.

Francis Fellowes, for plaintiff.

E. J. Dooley, for defendant.

BLATCHFORD, C. J. The complaint does not appear to be demurrable, as showing on its face that it does not state facts sufficient to constitute a cause of action. It sets forth that the contract sued on was a parol contract made in Connecticut, and to be performed there, and that by the law of Connecticut it was and is a valid contract in law, and the consideration for it, set forth in the complaint, was a good consideration for the promises contained in the contract. This seems to be so by the decision in *Smith v. Richards*, 29 Conn. 232. But, even if not so, the complaint alleges it to be so, and hence is not demurrable for the cause alleged. The defendant may answer in 20 days on payment of costs.

*Reported by S. Nelson White, Esq., of the New York bar.

MENGIS and others v. LEBANON MANUF'G Co.*

(Circuit Court, S. D. New York. January 24, 1882.)

1. VERDICT—WHEN COURT WILL SET ASIDE.

It is only where it is so palpable that the jury have erred as to suggest the probability that the verdict was the result of misapprehension or partiality, that the court will interfere to set aside the verdict. It is not enough that the judge might have arrived at a different conclusion, nor that there may have been a strong preponderance of evidence in favor of the defeated party.

Motion to Set Aside Verdict.

WALLACE, D. J. As one of the questions of fact in this case, the jury were called on to decide whether the plaintiff understood Mr. Meily to have general authority to represent the defendant in making a contract for the sale of cars, or understood him to be a broker for the defendant in the particular transaction. There was undoubtedly cogent evidence to show that the defendant's officers held Meily out to the plaintiffs as having general authority to bind the defendant in making such a contract; but, on the other hand, there was explicit testimony to the effect that the officers of the defendant had told one of the plaintiffs very recently that Meily was not their agent; that they would not appoint any agent; and that they acted, and intended to act, personally in such transactions. It was also fairly inferable, from the fact that plaintiffs asked for evidence of Meily's authority, that they were not satisfied to treat with him as a general agent without the proof of his agency. It was a question of credibility of witnesses whether such written authority was or was not furnished by Meily. There was also *indicia* in the transaction which might justify an inference that the plaintiffs and Meily were co-operating together more with a view to securing commissions for themselves than to obtain a satisfactory contract for the defendant. Upon the whole case, therefore, I am of opinion that a case is not made which would justify setting aside the verdict. It is not enough that the judge might have arrived at a different conclusion, nor even that there may have been a strong preponderance of evidence in favor of the defeated party. It is only where it is so palpable that the jury have erred as to suggest the probability that the verdict was the result of misapprehension or partiality, that the court will interfere.

Motion denied.

See *Brown v. Memphis & C. R. Co.* 7 FED. REP. 51.

*Reported by S. Nelson White, Esq., of the New York bar.

WOOSTER v. HOWE MACHINE CO.*

(Circuit Court, S. D. New York. February 10, 1882.)

1. PRACTICE—EXTENSION OF TIME TO TAKE TESTIMONY.

The time to take testimony extended, where such testimony, if admissible under the answer, applies equally to other cases in which the time to put in proofs had not expired.

In Equity.

F. H. Betts, for plaintiff.

J. F. Dillon and *W. H. L. Lee*, for defendants.

BLATCHFORD, C. J. In this case, and in the cases against Schenck and the Singer Company, if these three cases stood alone, and there were not the two cases in which the three months have not expired, and in which the testimony referred to in the notice of motion has been or can be put in, I should regard the defendants as precluded by laches and by their stipulation from asking for the extension in these three cases to put in such testimony. But, as the testimony will apply to every case equally with every other case if admissible under the answer in the case, it seems proper, as the testimony is not fully closed, to allow the extension for the purpose named in the notice, subject to all objections to be made, or already made, on the record to its admissibility or relevancy, except the objection that the time to take it has expired.

SCHNEIDER v. LOVELL and another.*

(Circuit Court, S. D. New York. February 10, 1882.)

1. LETTERS PATENT—SHADE-HOLDERS FOR LAMPS—CONSTRUCTION OF.

Reissue 7,511, granted to B. B. Schneider, February 13, 1877, for an "improvement in shade-holders for lamps," held to be limited to the particular form of shade shown in the drawings, as nothing is said in the specification or claims as to the shape or size or proportion of the parts of the shade.

Gifford & Gifford, for plaintiff.

J. P. Fitch, for defendants.

BLATCHFORD, C. J. This suit is brought on reissued letters patent No. 7,511, granted to the plaintiff, February 13, 1877, for an "improve-

*Reported by S. Nelson White, Esq., of the New York bar.

ment in shade-holders for lamps;" the original patent, No. 182,973, having been granted to Carl Votti, as inventor, October 3, 1876. The specification of the reissue says:

"My invention relates to lamps, and it consists in a transparent shade-holder, or holder of a material allowing the passage of light and shade, or globe, so annexed that an ordinary lamp-burner can be used without a chimney, as will be hereinafter more fully set forth. In the annexed drawing, figure 1 is a vertical section of my invention. Figure 2 is a plan view of the shade-holder. A represents an ordinary lamp-burner, provided with a circumferential flange, *a*, for the support of the cone, *b*, and which, ordinarily, also serves to support the chimney or cylinder. This flange is provided with suitable perforations, through which air is admitted both inside and outside of the cone. Instead of using the flange, *a*, for the support of the ordinary chimney, I place on the same my shade-holder, *b*, which is made of glass or other suitable transparent material, or material that will allow of the passage of light and which is provided with a tubular extension or socket, *c*, that fits over the cone, *b*, leaving an air space between its inner surface and the outer surface of said cone. From said socket extends a broad dish-shaped flange, *d*, which is provided with a rim, *e*, and which serves to support and retain the shade, *C*. The flange, *d*, is perfectly closed, so that no air will pass to the flame except what is admitted through the perforations in the burner-flange, *a*, and by these means I am enabled to produce a bright flame without the use of an ordinary chimney or cylinder. The advantage of this arrangement will be apparent, since it allows of keeping the burner clean, and of trimming the wick without difficulty, and the annoyance of broken chimneys is avoided. It will be seen that with the shade-holder and shade annexed, as shown and described, the ordinary burner will perform the required functions without the use of a chimney. I am well aware that transparent shade-holders are of themselves not new; hence I do not claim such, broadly, as being my invention."

The claims of the reissue are as follows:

"(1) In a lamp having a burner, the combination of a shade-holder made of material that will admit of the passage of light, and a shade or globe arranged and constructed substantially as described, whereby the burner performs the required functions without the use of a chimney, as set forth. (2) The shade-holder, *B*, constructed of material that will admit of the passage of light, and provided with a downwardly-extending socket, *c*, and dish-shaped flange, *d*, with rim, *e*, in combination with a globe or shade, *C*, and burner, *A*, of a lamp, as and for the purposes herein set forth. (3) The combination in a lamp of the burner, *A*, having perforated flange, *a*, and cone, *b*, the shade-holder, *B*, with central socket, *c*, and a shade or globe, *C*, substantially as and for the purposes herein set forth."

One of the defences set up in the answer is that, in the specification of the reissue, there is not given, as required by the statute, a description of the invention, and of the process of making, construct-

ing, and using it, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and use the same; nor is there explained in or by said specifications the principle of the alleged invention, and the best mode in which said Votti has contemplated applying that principle, so as to distinguish it from other inventions, and that, therefore, the patent is void.

In the specification nothing is said as to the shape or size of the parts, or proportion of the parts, of the shade, C. Nothing is said about it except to call it a globe or shade, and to designate it as C, by a letter of reference to the drawings. Nothing is said as to the diameter of the contraction at the narrowest part of it, near its top, as compared with the diameter of the socket, c, of the shade-holder; and nothing as to its height, or as to the degree of flare of the shade-holder. These things are shown by the evidence to be material in constructing an arrangement of the kind, which will give as good a light as with the use of a chimney. The object of the arrangement is stated in the specification to be to use an ordinary burner, without a chimney, and to dispense with the ordinary chimney. This can only mean that as good a light is to be produced without as with a chimney. The meaning of the words "a bright flame," in their contest, is, as bright a flame as the chimney will produce. The meaning of the expression, that "the ordinary burner will perform the required functions without the use of a chimney," is that the ordinary burner will give as much light without the use of a chimney. This is to be done by having "the shade-holder and shade arranged as shown and described," yet the features of construction, and shape and size and proportions of the shade, are not set forth. So, too, in claim 1, "a shade or globe arranged and constructed substantially as described," is spoken of, yet nothing is described as to the construction of the shade. It is true that, by looking at C, in the drawings, a shade of a certain form is shown. But the drawings are not said to be on a scale. Looking at the drawings, and making a shade from them, gives but one form of shade, at most, and there is no statement of the principle which is to govern the construction of the shade as to size and proportions. It is shown that a shade made, as nearly as can be ascertained, of the form and proportions shown in the drawings, will cause the burner to give light to some degree, but by no means to the same degree as the ordinary chimney will with the same burner. It is not the shade of the drawings that has been made and sold by the plaintiff under the patent,

nor have the defendants made or sold the shade of the drawings. To reach the shades of either the plaintiff or the defendants, required experiment, adaptation, and invention beyond anything shown in the drawings. Construing the patent as covering a shade of the form and dimensions and size and height and proportions shown in the drawings, no such shade has been made or sold by the defendants; and so there has been no infringement. This is the most favorable view which can be taken of the patent.

The bill is dismissed, with costs.

JENNINGS and others v. KIBBE and others.*

(Circuit Court, S. D. New York. February 20, 1882.)

1. LETTERS PATENT FOR DESIGNS—TEST OF IDENTITY.

The true test of identity between two designs is their sameness of effect upon the eye of an ordinary observer, bringing to the examination of the designs that degree of observation which men of ordinary intelligence give.

2. SAME—EVIDENCE OF IDENTITY—COMPARISON BY COURT.

Where, in a suit upon design patents, the only proofs introduced were the patents and the alleged infringing article, *held*, that the designs being of a simple character, the absence of testimony as to identity did not make it improper for the court to compare them and determine the question of identity from such comparison.

Seem this practice is not to be extended to all patents for designs.

In Equity.

A. v. Briesen, for plaintiffs.

J. R. Bennett, for defendants.

BLATCHFORD, C. J. This suit is brought on the letters patent for designs. One is No. 10,388, granted to Abraham G. Jennings, for 14 years, on January 1, 1878, for a "design for lace purling." The other is No. 10,448, granted to Warner P. Jennings, for seven years, on February 12, 1878, for a "design for a fringed lace fabric." The specification of No. 10,388 says:

"Figure 1 represents a photographic illustration of my new lace purling. Figure 2 is a photographic illustration of the same design made of coarser thread. This invention relates to a new design for a lace fabric, and consists in providing the pillars thereof with more or less irregular, laterally-projecting loops, thereby imparting to the entire fabric a puckered, wavy, purl-like appearance, which is indicated in the photograph. The loops on the pillars are placed close together to increase the effect."

*Reported by S. Nelson White, Esq., of the New York bar.

The claim is this:

"The design for a lace purling, the pillars whereof are provided with irregular, laterally-projecting loops, substantially as shown."

The specification of No. 10,448 says:

"The accompanying photograph illustrates a face view of my new design. This invention relates to a new looped fringe applied in series to lace fabrics. A represents the lace fabric of usual kind. B B are the disconnected fringes applied thereto. Each fringe, B, is formed with loops at both sides of a central stem or rib along its entire extent, as shown, thus producing a peculiar full and yet loose effect. The fringes are arranged in series of rows, and suspended from the lace fabric."

The claim is this:

"The design for a lace fabric provided with disconnected doubly-looped fringes, B, leaving loops at both sides of a central stem or rib, substantially as shown."

The answer denies infringement, and sets up various defences to both patents. In taking proofs for final hearing, the counsel for the defendants being present, the plaintiffs put in evidence the two patents and assignments to the plaintiffs, and a "nubia." The counsel for the defendants admitted, on the record of proofs, that the said nubia was purchased from the defendant firm prior to the commencement of this suit. The plaintiffs then rested their case. The defendants took no testimony. The plaintiffs bring the case now to final hearing, on the foregoing evidence, without introducing any witness to show the identity of design between what is found in said nubia and in the plaintiffs' patents. The defendants contend that it is not sufficient for the plaintiffs to show merely the sale of the nubia by the defendants, and to leave the court to inspect the nubia and compare it with the patents, but that the plaintiffs must produce a witness to testify to identity of design.

In *Gorham Co. v. White*, 14 Wall. 511, the supreme court considered directly the question of identity in regard to a patent for a design. It held that the true test of identity of design is sameness of appearance,—in other words, sameness of effect upon the eye; that it is not necessary that the appearance should be the same to the eye of an expert, and that the test is the eye of an ordinary observer, the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give. The court compared, in that case, the design of the patent with the

designs on the defendants' article, and arrived at the conclusion from such comparison that the designs of the defendants were, in their effect as a whole, notwithstanding variances, substantially the same as the design of the patent and infringements. In addition to this there was the testimony of witnesses on both sides on the question, and the court was of opinion, also, that the testimony proved the infringements.

In view of the proper test of identity, as above given, and of the simple character of the designs in the present case, and of the absence of any testimony on the part of the defendants, I am of opinion that the absence of testimony as to identity does not make it improper for the court in this case to compare the defendants' nubia with the patents, as to design, and determine the question of identity from such comparison. It is not intended to imply that the practice can be extended to any other patent than one for a design, or that it ought to be extended to all patents for designs.

On such comparison it is found that the defendants' nubia infringes both of the patents, and a decree in the usual form in favor of the plaintiffs, with costs, will be entered.

ADAMS v. MEYROSE and another.*

(Circuit Court, E. D. Missouri. March 2, 1882.)

1. PATENTS—LICENSE TO MANUFACTURE AND SELL—BILL TO ANNUL LICENSE AND FOR DAMAGES—DEMURRER.

Where a complainant alleged in his bill that "by virtue of mesne assignments duly recorded in the patent-office of the United States" he was the sole owner of certain letters patent within and for a certain state; that he had licensed the defendant to manufacture the patented article in that state, and sell it throughout the United States; that the defendant had agreed to sell the articles manufactured under said license at certain schedule prices, and to pay the complainant a certain royalty; that by the terms of the license the rights of the defendant were to be forfeited and the license to become void in case of failure on the licensee's part to perform any of the agreements in the license contained for a specified length of time after notice, or to make returns of sales or payments for 20 days after specified dates; that defendant sold articles manufactured under said license at less than the schedule prices, and failed to pay a royalty as he had agreed to; that complainant had notified him that from and after a certain date, 24 days thereafter, he would consider said license void, in consequence of defendant's breaches of the agreements therein contained; that

*Reported by B. F. Rex, Esq., of the St. Louis bar.

after the date specified in the notice the defendant had continued to manufacture and sell the patented articles in said state as before, but had failed and refused to pay any royalty; and where the prayers of the bill were that the defendant might be required to answer thereto; that said license might be declared null and void; for damages, and for general relief,—*held*, that the bill sufficiently set forth facts entitling the complainant to relief in a court of equity.

In Equity. Demurrer to bill.

The plaintiff, by his bill, alleges—

“That heretofore, to-wit, on the first day of January, A. D. 1880, your orator, by virtue of mesne assignments duly recorded in the patent-office of the United States, became and now is the sole owner of all right, title, and interest in and to certain letters patent of the United States, within and for the state of Missouri, on an improved lantern; that on the tenth day of January, 1880, he licensed the defendants to manufacture such lanterns in St. Louis and sell them throughout the United States; that defendants agreed to sell the lanterns manufactured by him under said license at certain agreed prices, and to pay a specific royalty to the complainant; that the license was upon condition that if defendants should fail to keep and perform any of the agreements therein contained for 10 days after notice in writing specifying said default, or should neglect or refuse to make returns, or to make payments for 20 days after the times therefor specified, the license should become null and void, and all rights to use any of said improvements should be forfeited, and the complainant might treat the defendants as infringers for any manufacture or sale of said improvements after said forfeiture; that the defendants sold said improved lanterns in said state for less than the prices agreed upon, and failed to pay the agreed royalty at the times specified in said license; that on the twenty-seventh day of July, 1880, the complainant caused the defendants to be notified that after the twentieth day of August, 1880, said license would be considered null and void by the complainant, by reason of the defendants having failed to comply with its terms; that since August 20, 1880, defendant has continued to manufacture said improved lanterns in the state of Missouri, and to sell them as before, but has failed and refused to pay any royalty to the complainant; and that in consequence of the defendants having violated the said agreement, and continued to manufacture and vend said lanterns as aforesaid, the complainant has been damaged in the sum of \$4,000.”

The prayer of the bill is as follows, viz:

“That the said Ferdinand Meyrose and Bernard Meyrose [the defendants] may be required to make full and direct answer to the same, but not under oath, an answer under oath being hereby expressly waived, and that the said agreement and contract between your orator and said defendants, hereinbefore set forth, may be by this honorable court declared null and void, and that said agreement and contract may be delivered up to be cancelled; that all rights to use any of the inventions and improvements in said agreement and contract granted to said defendants may be forfeited; that said defendants may be decreed to pay to your orator the sum of \$4,000 damages for their wrongful

acts as aforesaid, and such further sum as the court shall deem equitable and just; and that your orator may have such other or further relief in the premises as equity may require and to your honors may seem meet."

The defendants demurred to the bill on the following grounds, to-wit:

First, that the complainant is not entitled to a discovery upon which to predicate a forfeiture; *second*, that the complainant can have an effectual and complete remedy at law; and, *third*, that the bill is multifarious.

Coburn & Thatcher, for complainant.

Edward J. O'Brien, for defendants.

TREAT, D. J. A demurrer is interposed to the bill on grounds therein stated. The plaintiff, claiming to be the assignee of patents mentioned, granted to defendants a license for the use of the same on terms prescribed. A former suit was brought for an infringement, which this court held could not be maintained so long as said license was outstanding.* Its ruling was based on *Hartell v. Tilghman*, 99 U. S. 547. This suit is for the revocation of said license and for other relief. Under the allegations of the bill, if maintained, the plaintiff's right to relief will obtain, the measure thereof to follow as the facts may demand.

The court holds the demurrer not well taken, and the same is overruled.

TIFFT v. SHARP and another.

(Circuit Court, S. D. New York. May 8, 1880.)

1. PATENTS—IMPROVEMENT ON GAS STOVES.

The combination of a flange around the top of a burner may make a new burner and a new combination on a burner, so as to be patentable, but the patent would only cover the precise form of burner so made, and would be infringed only by a burner of that exact form, or by such a flange with some other form of burner.

2. WHAT NOT INVENTION.

Perforations of annular series are mere workmanship, not invention.

In Equity.

Benj. F. Lee, for plaintiff.

Arthur v. Briesen, for defendants.

WHEELER, D. J. This suit is brought for an alleged infringement of reissued letters patent No. 7,077, granted to the plaintiff, April 25,

*See 7 FED. REP. 208.

1876, for an improvement in gas stoves; the original patent, No. 49,469, having been granted August 15, 1865, to Elijah J. Caldwell and Alexander M. Lesley, on the invention of said Caldwell. Among other defences, defendants deny infringement.

The patent has four claims, the first, second, and fourth of which only are claimed to be infringed. All of them are for combinations of parts. The combination of the first claim is of a perforated diaphragm, through which air and gas pass and become mixed, a chamber between the diaphragm and outlet, and an annular outlet consisting of a series of perforations, through which the material passes from the burner. That of the second claim is of a gas supply-pipe, an air cylinder, a perforated diaphragm above them, through which the air and gas pass, a cap above the diaphragm, and an annular outlet below the top of the cap. And that of the fourth claim is of a laterally-projecting flange, overhanging the outlet, with a burner containing the parts mentioned in the other claims. From all the evidence in the case, it satisfactorily appears that none of these parts by themselves were new to these purposes, except the laterally-projecting flange. The perforations of no annular series had been placed so closely together, probably, as Caldwell placed them, but such series had been made before, and it was mere workmanship, not invention, to make them thicker if they were needed thicker. Perhaps the combination of the flange around the top with the rest of a burner made a new burner, and a new combination in a burner, so as to be patentable; but, if so, the patent would properly cover only the precise form of burner so made, including the flange, and the flange itself, as a part of the patented combination or patented burner. Hence, the patent would not be infringed but by that exact form of burner throughout, or by such a flange with some other form of burner. *Sharp v. Tift*, C. C. S. D. N. Y. Oct. term, 1879. The defendants are not shown to have used either that form of burner or the flange with any other form; therefore, the patent cannot be upheld to an extent broad enough to make what they have done an infringement.

Let the bill be dismissed, with costs.

See 2 FED. REP. 697.

FAULKES and others v. KAMP and another.*

(Circuit Court, S. D. New York. February 13, 1882.)

1. LETTERS PATENT—BALING SHORT-CUT HAY—BASIS OF PROFITS.

Where the only claim of the patent infringed was for "pressing and binding short-cut hay into bales," short-cut hay being known before, the only profits to be allowed for such infringement are the extra profit due to selling such hay when baled, over selling it when loose or prepared for market in other known ways.

2. SAME—SAME—BURDEN OF PROOF.

It is the duty of the plaintiffs to give evidence separating such profits; otherwise only nominal profits can be allowed.

In Equity. On exceptions to master's report.

C. N. Judson, for plaintiffs.

J. C. Clayton, for defendants.

BLATCHFORD, C. J. The first claim of the patent, the only one infringed, is for pressing and binding short-cut hay into bales. Short-cut hay was known before. Pressing and binding it into bales made no change in its properties or quantity, but enabled it to be more conveniently handled for sale as merchandise, and for transportation. The profits to which the plaintiffs are entitled do not include any profits of converting long hay into short-cut hay. They include only the profits of pressing and binding into bales short-cut hay; hay after it is cut short. They do not include, either, any profits on the hay as hay, except such profits as resulted from the fact that, as short-cut hay, it was pressed and bound in bales, such last-named profits being the extra profits due to selling the short-cut hay pressed and bound in bales, over selling it as loose, short-cut hay, or as short-cut hay manipulated for market in some prior known way. The master appears to have reported profits on cutting the hay, and also other profits on the hay as hay than those above specified as allowable. The third exception must, therefore, be allowed. It was the duty of the plaintiffs to give evidence separating the profits above defined. In the absence of such proof only nominal profits can be allowed. It is also manifest that the master, in fixing four dollars a ton as profit in respect of the matter covered by the second exception, included profits on cutting hay, and the other improper profits above mentioned. The second exception is allowed. For the same reasons the fourth exception is allowed, and also the first. The report is set aside, and the

*Reported by S. Nelson White, Esq., of the New York bar.

case is referred back to the master, with liberty to the plaintiffs to apply to him for leave, to be granted or refused in his discretion, to give further proofs as to profits, and for a further report from him, based on the principles above laid down.

WERNER v. REINHARDT and another.

(Circuit Court, S. D. New York. September 29, 1881.)

1. DESIGN IN TRIMMING—INFRINGEMENT—INJUNCTION.

A design for trimming, produced by embossing on fluting machinery, confers the exclusive right to impress that appearance, and an imitation of the design will be restrained by injunction.

In Equity.

Arthur v. Briesen, for orator.

Jacob L. Hanes, for defendants.

WHEELER, D. J. This suit is brought for relief against infringement of design letters patent No. 11,186, granted to the orator on application made March 19, 1879, for a design for trimming, produced by embossing on fluting machinery, dated May 6, 1879. The orator makes and sells trimming according to his patented design, as he claims it to be, and the defendants admit having made the same thing; but they set up in defence that the patent does not cover that design; that the orator was not the original and first producer of the design which it does cover; and that so much of the design as they have made use of had been in public use and on sale, with the consent and allowance of the orator, for more than two years prior to his application for the patent.

The impression created at the hearing was that the defendants had not, in view of all the evidence on both sides, sustained either of the last two defences by the requisite measure of proof. A careful review of all the evidence confirms that impression. The specification and drawings of the patent, taken all together, show a row of embossed, smooth, oblong, and half-cylindrical projections between and parallel with two rows of ordinary fluting, which are the prominent and original features of the design, and are what the orator's trimming, made under the patent, show. This design is what he invented. It proved attractive, and his patent conferred upon him the exclusive

right to impress that appearance upon trimmings. The defendants appear to have infringed upon that right.

Therefore, there must be a decree for an injunction and an account, according to the prayer of the bill, with costs.

SEIBERT CYLINDER OIL CUP CO. v. PHILLIPS LUBRICATOR CO.

(Circuit Court, D. Massachusetts. February 23, 1882.)

1. PATENTS—ASSIGNMENT—TITLE—PARTIES.

Where an assignment is made the motive is not material. The legal title passes to the assignee, who may maintain suit for infringement without joining the patentee.

In Equity.

J. P. Treadwell, for complainants.

T. W. Clarke, for defendants.

LOWELL, C. J. The complainants are assignees of patent No. 138,243, granted to John Gates for a very ingenious and useful lubricator for steam-engines. The defendants contend that one Parshall made the same invention a few weeks or a few months before Gates, though he took a patent some six years later. The evidence is not in a very satisfactory state, being a copy of that which was taken in a case of interference to which Gates was not a party. I have read it carefully, and do not find that Parshall completed and reduced to practice the invention in question before Gates made it. The idea was probably conceived by the two inventors nearly at the same time. Which was the earlier to conceive it I cannot say, but Gates fully tested and proved and adapted it to use while Parshall was trying to overcome a practical difficulty of construction which the particular form of his machine required him to overcome, and he did not succeed until years after Gates' machine had been in general use.

The assignment to the plaintiffs was made an assignment, rather than a license, in order that they might sue in their own names—so the contracts recite; but there is no legal objection to this: the motive is not material, and, the whole legal title being in the plaintiffs, they may maintain this suit without joining the patentees.

Decree for complainants.

THE GLARAMARA.

(District Court, D. Oregon. February 28, 1882.)

1. TENDER OF PILOT SERVICE.

Semble that a tender of pilot service by a river pilot, to a vessel bound on a voyage to Portland, is not valid if made below Astoria, and before the vessel has reached the pilot-ground of such pilot.

2. AMENDMENT OF STATUTE.

Semble that section 1 of the act of December 20, 1865, (Sess. Laws, p. 33; Or. Laws, p. 707, § 12,) giving half pilotage for a tender of pilot service to a vessel navigating the Columbia or Wallamet rivers above Astoria, was passed in contravention of section 22 of article 4 of the constitution of the state, and is therefore void; but if considered valid, then section 1 of the act of October 25, 1870, (Sess. Laws, p. 51; Or. Laws, p. 710, § 27,) declaring that such vessel, when "towed by a tug or steamer," should not be required "to take a pilot or pay half pilotage," is also valid, and therefore a pilot is not entitled to recover half pilotage for a tender and refusal of pilot service.

Rufus Mallory, for libellant.

William H. Effinger, for respondent.

DEADY, D. J. This suit is brought by the libellant, W. A. Betts, a river pilot, to recover the sum of \$34 as half pilotage for a tender of services as such pilot to the bark Glaramara.

The libel alleges that on September 18, 1881, the Glaramara, a foreign ship of 800 tons burden, was in the Columbia river below Astoria, bound on a voyage to Portland, when the libellant, a duly-qualified and licensed pilot for the Columbia and Wallamet rivers above Astoria, duly offered his services to the master of said vessel to pilot her to Portland, which offer was refused, although said vessel had no river pilot on board, nor had she then been spoken by any one; and that said vessel made the voyage to Portland and arrived here about six days thereafter.

The master, Robert Morton, on behalf of the owners and claimants, George Nelson & Sons, White Haven, England, excepts to the libel because it does not appear therefrom that the libellant is entitled to have any sum as pilotage from said bark. The exception does not state specifically, as it ought, wherein the libel is defective, but upon the argument it was contended (1) that the tender of services being made below Astoria, off the libellant's pilot-ground, was therefore insufficient and of no effect; and (2) that it does not appear whether said voyage of said vessel to this port was made under sail or in tow.

By the law of Oregon (Sess. Laws 1865, p. 33; Or. Laws, p. 707, § 12) it is provided that any river pilot "who shall first speak any sea-going vessel ascending or descending the river above Astoria," shall be entitled to half pilotage therefor. The pilot-ground of the Columbia and Wallamet river pilots reaches "from Astoria to the head of navigation," but from Astoria to the open sea beyond the bar is the pilot-ground of the bar pilots. Or. Laws, pp. 706-7, §§ 6, 7, 11. Astoria is a port of entry where foreign vessels bound to Portland stop to enter, and usually change the bar tug for a river one.

The argument of the libellant is that a competent and enterprising body of pilots is necessary to the security and convenience of commerce on these rivers, and to this end the law allows half pilotage to the pilot who first tenders his services to a vessel "ascending or descending" the same, and for the same reason will permit the tender of such services to be made before such vessel has reached Astoria, and as soon as she is inside the bar of the Columbia. In support of this proposition and argument, counsel cites *Steam-ship Co. v. Joliffe*, 2 Wall. 456; *Wilson v. McNamee*, 102 U. S. 572; *Horton v. Smith*, 6 Ben. 264; *The Traveler*, Id. 280; *The Georgia D. Loud*, 8 Ben. 392.

It is not denied that claims for pilotage are within the admiralty jurisdiction, and that a valid offer and refusal of pilotage service under the law giving half pay therefor establishes a claim for pilotage that may be enforced in this court. *The Glenearne*, 7 FED. REP. 604, and cases there cited. But the necessity of compulsory pilotage between Astoria and Portland, where sail-vessels are usually towed by steam-boats with licensed pilots on board, may well be questioned. Neither do I think that the usual arguments in favor of half pilotage as a means of encouraging and maintaining an active and competent body of pilots upon and about bars and other dangerous waters in the vicinity of or immediate approach to frequented harbors and ports, apply to the pilot-grounds between Astoria and Portland. The duties of the river pilots, though requiring skill and local knowledge, are comparatively simple and free from danger. A vessel at Astoria does not require a pilot until she is ready to ascend the river, and in the mean time can remain at anchor or the dock in comparative safety.

From the nature of the case, then, I am of the impression that a tender of pilot services by a river pilot to an ascending vessel below Astoria, on the bar pilotage ground, is invalid and of no effect.

The cases of *Horton v. Smith*, *The Traveler*, and *The Georgia D. Loud*, *supra*, cited in support of the sufficiency of the libellant's tender below Astoria, all relate to vessels bound through the passage in the East river called Hell Gate. By the law of New York, as construed by the court in these cases, the pilot-ground of a Hell Gate pilot extends at least from a point 17 miles eastward of Sands point on the sound to the city. For taking a vessel through the Gate channel certain fees are allowed, and for an offer and refusal of such pilot service half such fees are allowed. An additional compensation is also allowed for taking a vessel over any portion of the rest of this pilot-ground, which appears to extend east as far as the sound, before entering or leaving the channel, but nothing for a tender or refusal of services thereon. The tenders in the cases cited appear to have been made within the pilotage ground of the pilots making them, and to vessels bound through the Hell Gate channel, though not then in it, and upon that ground they appear to have been upheld.

But in the case of *The S. & B. Small*, 8 Ben. 523, the same court held that a tender of services by a Hell Gate pilot to a vessel then S. S. E. of Block island, "bound to the sound," and through Hell Gate, was invalid. In support of this conclusion Judge Benedict says:

"It seems reasonable to say that the master of a vessel cannot be required to determine whether he will or will not accept the services of a pilot when his vessel is so far distant from the channel, as to which the pilot is supposed to be informed, and for which his services are needed, that the presence of a pilot on board for the purpose of navigating those channels would, under all possible circumstances, be absurd."

River pilots are not required to keep a pilot-boat, or cruise for vessels. There is no necessity for incurring such expense, and the compensation allowed them does not or ought not to warrant it. But, if a river pilot is allowed to make a valid tender of his services below Astoria, on the bar pilot's ground, the result will be an unfair combination between certain of the river pilots and the bar pilots, by which the former would be allowed practically to cruise on the barges or pilot-boats for vessels bound to Portland, and tender their services as pilots above Astoria, and thus be enabled to monopolize the business.

But beyond all question this exception is well taken upon the second ground assigned on the argument; for by section 1 of the act of October 25, 1870, (Sess. Laws, p. 51; Or. Laws p. 710, § 27,) it is provided "that no sea-going vessel, while navigating the Columbia or

Wallamet river, shall be required to take a pilot or pay half pilotage, if such vessel be towed by a tug or steamer."

It is not alleged in the libel that the Glaramara made the voyage in question to Portland under sail, or that she was not towed here by "a tug or steamer." It would probably be better pleading to have raised this question by a peremptory exception, analogous to a plea in bar at common law, containing an allegation that the vessel made the voyage in tow of a steamer. But it is tacitly admitted that she was so towed, and counsel have submitted the question upon this exception, in the nature of a demurrer to the libel, for the omission of the allegation that the bark made the voyage under sail, and it will be so considered.

Counsel for the libellant admits that under the act of 1870, *supra*, the bark was not required to take a pilot or pay half pilotage unless it appears that she was not towed up the river, but insists that said act is invalid because it is an attempt to amend the act of 1865, *supra*, which required her to take a pilot or pay such pilotage whether towed or not, contrary to section 22 of article 4 of the constitution of the state, which enacts: "No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

In my judgment this objection to the validity of the act is well taken. It is in substance and effect a material amendment of the act of 1865, made without the slightest regard to the mandate of the constitution, and in direct contravention of it. But it appears that the supreme court of the state, in *Grant Co. v. Sels*, 5 Or. 243, has decided that a repeal by implication—that is, without referring to the act repealed—is not within the purview of the constitutional prohibition, and is therefore valid. This court is bound by that decision. A similar question was before me in *Mayer v. Cahalin*, 5 Sawy. 355, when I took occasion to give my views of the constitutional provision, but gave judgment according to the ruling in *Grant Co. v. Sels*. But it may be that this act of 1870 is invalid even under the doctrine of the supreme court as announced in *Fleischner v. Chadwick*, 5 Or. 153; *Grant Co. v. Sels*, Id. 243; *Doland v. Barnard*, Id. 391. The act is entitled "An act further to amend the several acts relating to pilotage and towage on the Columbia bar and the Columbia and Wallamet rivers." This is at least a reference to the act of 1865 by its "subject" if not by its title. The distinction taken in the cases cited seems to be that if an act professes to be amendatory of another it

must be passed in conformity to the constitutional provision; but if not, although relating to the same subject, it is without its scope and operation. It is not, then, considered an amendment of any prior act, although it may change or repeal it by implication.

Admitting, however, that the act of 1870 is invalid, still this exception must be allowed. The act of 1865, under which the libellant claims half pilotage, was certainly passed in contravention of said section 22 of the constitution of the state. By section 1 of the act of October 21, 1864, (Com. Or. Laws 1864, p. 841, § 22,) the fees for pilotage between Astoria and the sea were specially prescribed, while "the fees of pilots on the river above Astoria" were to be "fixed" by the pilot commissioners. The act of 1865 professes to be amendatory of this act, and correctly refers to its title. The act of 1864 was itself amendatory of the act of October 17, 1860. It only contained two sections, and the attempt to amend it by the act of 1865 consisted in adding section 3 thereto, giving half pilotage to river pilots, as above stated. If the act of 1864 contained no provision on the subject of river pilotage in conflict with this added section, the amendment would be valid under any construction of the constitution. But the subject of pilotage above Astoria was already fully provided for in the first section of the act of 1864, to which this section 3 of the act of 1865 professes to be an amendment. The latter, so far as it goes, is in direct conflict with the former, in that it takes the subject of half pilotage on the rivers out of the control of the commissioners, and prescribes an absolute rule on the subject. It purports to amend the prior act by adding a section thereto—by the addition of new matter, and not a change of the old; but it is in fact an attempt to amend—change—section 1 of said act without specially repealing and re-enacting it as amended.

It follows that the libellant cannot recover in this case, because, either the act of 1865, giving the right to recover half pilotage, was void from its inception, as being passed contrary to the constitution, or the act of 1870 is valid, and repealed by implication so much of the act of 1865 as allowed half pilotage for an offer and refusal of services.

The impropriety of taxing vessels navigating the river in tow with the expense of pilotage in addition to towage is so apparent that the act of 1865, which was the first one that ever undertook to make pilotage compulsory on the rivers, was soon repealed, or attempted to be.

When a vessel is being towed along-side between Astoria and Portland by a river steam-boat with a licensed pilot on board, responsible for the navigation of both tug and tow, which, for the time being, are practically one, a more useless burden could not be imposed on commerce than to require the former to take a pilot or pay half pilotage for the offer and refusal of one.

The exception is allowed and the libel is dismissed.

THE DOXFORD.

(*District Court, D. Oregon.* February 28, 1882.)

DEADY, D. J. This is a suit *in rem* to recover \$29 as half pilotage, for a tender and refusal of pilot service between Astoria and Portland, under circumstances similar to those of the foregoing case. The same defence was made in this case as in that, and they were argued and submitted together.

The exception is sustained and the libel dismissed.

THE SCOTIA.

(District Court, E. D. Wisconsin. October Term, 1881.)

1. COLLISION—FAULT FROM WANT OF DUE VIGILANCE AND CAUTION.

A schooner on reaching a point in the river dropped her anchor to await the arrival of a tug. She was probably about 300 or 350 feet from the shore at the time, the channel at that point being about one-quarter of a mile wide. While in this position, with her anchor light displayed, a tug, with an extensive raft of logs in tow, approached her from the north. At about the same time a propeller entered the river under checked speed, approaching the tug, which had all its signal lights burning. The raft in tow caught the anchor chain of the schooner and dragged her down the river towards the propeller, when a collision ensued between the propeller and the schooner, occasioned by the maneuvers of the propeller. *Held*, that there was devolved upon the propeller the duty of exercising a degree of caution and vigilance commensurate to the occasion, and that under the circumstances of this case such caution was not exercised.

In Admiralty. Suit *in rem*.

George C. Markham, for libellant.

Cottrill & Cary, for claimant.

DYER, D. J. This is a suit *in rem* prosecuted by the libellant, as owner of the schooner J. O. Thayer, to recover damages for injuries resulting from a collision with the propeller Scotia. The collision occurred in the Detroit river, off Bois Blanc island, at about 11 o'clock in the evening of October 25, 1875. The facts, which may be said to be established by the testimony, are as follows:

The Thayer was making a trip from Buffalo to Racine, Wisconsin, and on reaching a point in Detroit river, near to or just above the head of Bois Blanc island, in the evening of the day named, dropped her anchor and awaited the arrival of a tug by which she might be towed to Lake Huron. There is some dispute as to the distance from her place of anchorage to the island; but the weight of the evidence is that she was not lying in mid-channel, but was quite close to the island shore, probably from 300 to 350 feet from that shore. The testimony shows that the channel at that point is about one-quarter of a mile wide. There was a vessel lying at anchor above the Thayer, and another small vessel lying about 60 feet astern, and somewhat nearer the island shore than the point where the Thayer was at anchor. While the Thayer was in this situation, with her anchor-light displayed, a tug with an extensive raft of logs in tow approached her from the north. At about the same time the propeller Scotia, on a voyage from Buffalo to Chicago, entered the mouth of the river, and proceeded, under checked speed, on her course up the river. The night was dark and misty, and there was a stiff wind blowing from the south-east. The tug with the raft in tow, carried, in addition to red and green lights, two bright lights placed one above the other, indicating that she had a tow. There were lights, also, on the raft. As the tug approached the channel be-

tween the island and the Canada shore, she headed towards the latter shore, undoubtedly with a view to prevent the rear end of the raft, which would naturally swing towards the island shore in its passage down the river, from striking the vessels lying at anchor. The master of the Scotia testifies that he saw the green light and the two white lights of the tug about 15 or 20 minutes before the collision between the Scotia and the Thayer; and both he and his mate then supposed that they were the lights of a vessel lying at Frazer's dock, a point on the Canada shore opposite the island. The Scotia moved slowly up the river, until her master observed that the lights he had seen were on an approaching vessel. When the tug and propeller had got so close to each other that the escaping steam from the tug was discernible, the master of the Scotia blew two blasts of her whistle, indicating that he desired to pass on the starboard side of the tug. The tug responded with one blast, indicating that her master desired the Scotia to pass on her port or windward side. The master of the Scotia, however, adhered to his determination, and again blew two blasts of her whistle. The two vessels were then very close to each other, and the tug thereupon responded with two blasts. There is no doubt, I think, that the Scotia gave the first signal as the two vessels approached each other. The testimony on the part of the claimant tends to show that when the lights of the tug were first seen from the Scotia, the two vessels were about two miles apart; but, of course, it was difficult, under the circumstances, to form an accurate judgment of the distance. As the propeller and the tug passed each other, the master of the Scotia discovered the Thayer some distance ahead. The Scotia had been moving slowly, and when the Thayer was sighted, both engines of the propeller were stopped. Soon after this, the rear end of the raft caught the anchor chain of the Thayer, and dragged her some distance down the river, towards the Scotia. Either while the Thayer was thus being dragged, or after she had stopped dragging, and was again lying at anchor, she and the propeller came in collision. What is the fact in this regard is the question most controverted in the case. The witnesses for the Thayer testify that the raft had got free from that vessel, and had passed down the river when the collision occurred, and that while the Thayer was securely anchored, the Scotia, by three repeated movements ahead, struck the Thayer. The witnesses for the Scotia testify that, as the Scotia was beginning to back and when she actually had sternway, the raft was still dragging the Thayer down upon her, and that the collision was wholly occasioned by this fact; so that, according to the claim made in behalf of the propeller, the Thayer struck the Scotia while the latter vessel was retreating.

That the Thayer was in a proper place of anchorage I think there can be no doubt. The testimony of disinterested witnesses is that vessels bound up the river awaiting a tug, usually lie there. As before stated, she was not lying in mid-channel, but was sufficiently close to the island shore to leave a good passage on the Canada side. The master and mate of the Scotia, on sighting the lights of the tug, made a serious mistake in supposing that they were the lights of a boat lying at the dock on the Canada shore; and it is reasonable to

believe that if at that time, and even after, the Scotia had taken a course to the windward of the tug, the two boats could have passed each other without difficulty. But it is evident that the state of the atmosphere, the course of the wind, and the darkness of the night rendered navigation at that point somewhat difficult; and, if this were the sole point in the case, I should be disinclined to hold the Scotia at fault in taking a course on the island side of the channel; but, in the light of other facts in the case, I am of the opinion that she must be held responsible for the collision.

It cannot be well denied that both the master and mate of the Scotia knew, or should have known, when they saw the two white lights of the tug, that she was a craft with a tow; and it is somewhat surprising that they did not sooner discover that they were the lights of a moving boat. That such was the fact, does not, however, seem to have been known until the tug and the propeller were very near each other; so near that the master of the Scotia could see the steam escaping from the tug. It is true that the raft could not yet be seen, and it is also true that the Scotia was moving ahead with checked speed; but as the lights of the tug were seen when about two miles away, and as those lights were steadily approaching, and clearly indicated that the tug had a tow of some character, there may be ground for doubt whether, in view of the responsibility which the circumstances cast upon the propeller, those in charge of her took such precautions as were required, with due promptness.

Whether, as a proper precaution, the Scotia should have stopped and laid to as soon as the fact must have been discoverable that the lights of the tug were on a moving boat with a tow, or not, I am satisfied that in some of the subsequent maneuvers of the Scotia she was in fault. And, first, I do not think the facts and circumstances developed by the testimony establish the claim that the Thayer was dragged down upon the Scotia by the raft, and that the collision was occasioned thereby. It is true that the Thayer was dragged some distance down the river, and at least as far as the vessel that had been lying about 60 feet astern of her. But the principal witnesses for the libellant, who were on board the Thayer, testify positively that the raft was free from the vessel and had passed down the river, and that the Thayer was stationary when the collision occurred; and as they were on the deck of the vessel watching closely the movements of both the raft and vessel, they certainly had much better opportunity for observing, just when the two became disentangled, than had the master and mate of the Scotia, who were some distance

off, and had to make their observations at a distance and in the darkness of the night, and at the same time attend to the navigation of their boat. The circumstances, taken together, tend quite strongly to indicate that the collision between the Thayer and the raft was not of a serious character. It was not sufficient to impede the progress of the tug and the raft, for the master of the tug states that he was not aware at the time that the raft had struck the Thayer. No injury was done to the raft, as was found on examination after its arrival at Toledo, and I do not think that the contact of the Scotia with the Thayer, which certainly occurred more than once, is reasonably explainable on the theory that the raft was all the time foul of the Thayer and dragging her against the Scotia. That the Thayer did strike the vessel lying astern of her is true, but that would have a tendency to arrest her momentum and to separate her from the raft; and I think the circumstances tend to establish the conclusion that the Thayer came to anchor again near the place where the vessel which had been astern of her was then lying.

The master of the Scotia testifies that as he passed the tug he saw the Thayer. She was then at anchor. The raft had not yet struck her. The vessel was over 1,000 feet distant from the Scotia. The master of the propeller says also that he then saw the raft, and that he immediately stopped both engines of his boat and laid to. Now, I am strongly impressed with the belief that if this position had been maintained, or if the Scotia had then begun backing with both engines, the collision would have been avoided. At that juncture, when a vessel at anchor was lying ahead, and a tug, with a heavy raft in tow, was passing, there was devolved upon the Scotia the duty of exercising a degree of caution and vigilance commensurate to the dangers of the situation. *The Virginia Ehrman*, 97 U. S. 315; *Mills v. Steam-boat Nathaniel Holmes*, 1 Bond, 353. I am convinced that such caution was not exercised.

Concerning what was done the master of the Scotia testifies:

"I then saw the raft, and that it was very close to the Thayer's bow, and I think I spoke to the mate and said, 'I think there is room under that vessel's stern for us if we can get under there before the raft catches her.' I then put my wheel to starboard, and backed both engines and went ahead on the starboard engine, which had a tendency to slew the boat a little to the current westward."

He says further, that when he saw the raft strike the Thayer, he stopped the starboard engine and rang the bell to back, but that the raft dragged the vessel faster than the Scotia backed.

The mate of the Scotia also testifies as follows: "The captain asked me if I thought we could get under the stern of the Thayer. I told him it looked as though there was room enough. He said: 'I think we can get under there if the raft does not hook on to her.' I said I thought we could." Further, he says: "At the time the Scotia starboarded her wheel it looked as if the raft was going to strike the Thayer." The master of the Scotia further says: "I had made up my mind to go under the schooner's stern if the raft did not catch her; but I was pretty sure she would catch her, and she probably had made 100 revolutions, the port engine backing, and I then didn't stop the port engine, but rang to stop the starboard engine, the one that was going ahead, and rang to back as quick as I could between the bells so the engineer would understand it."

Thus it appears that after the Thayer was seen lying at anchor, and before the raft had struck her, but with the belief in the mind of the master of the Scotia that the raft and schooner would become entangled, he persisted in a maneuver by which he hoped to pass both the raft and vessel by going under the latter's stern; and to this, I think, in the light of all the circumstances, the collision must be fairly attributed. In other words, if the Scotia, when the position of the schooner and the raft with reference to each other was discovered, had backed with both engines, or had stopped both engines so that her forward movement would have been entirely arrested, my judgment is there would not have been a collision. The Scotia was under control, and when the situation was clearly one where danger was apparent, it was the duty of her master to withdraw his vessel from the position she was then in rather than to attempt the execution of a maneuver which brought the two vessels into even more dangerous proximity.

Decree for libellant.

GREENE v. KLINGER.*

SAME v. SAME.

SAME v. SAME.

(Circuit Court, E. D. Texas. February, 1882.)

1. REMOVAL OF SUITS—ACT OF MARCH 3, 1875.

Under the second clause of the second section of the act of March 3, 1875, (18 St. 470,) when in any suit mentioned therein there is a controversy wholly between citizens of different states, which can be fully determined as between them, then either one or more of the plaintiffs or the defendants actually interested in such controversy may, on complying with the requirements of the statute, remove the entire suit.

Barney v. Latham, 103 U. S. 205, followed.

2. SAME—WARRANTOR.

And one who was not sued by the plaintiff, but was brought into the suit as warrantor, on the motion of the defendant, has the same right to remove as if he had been an original defendant.

3. LANDLORDS AND WARRANTORS—SECTIONS 4788, 4789, REVISED CODE OF TEXAS.

The same rights are given landlords in suits for lands by section 4789 of the Revised Code of Texas, as in the same kind of suits are given to owners and warrantors by section 4788 of same Code.

Walton, Greene & Hill, for the motion.

Hancock & West, contra.

PARDEE, C. J. The above cases have been up and heard three times on motions to remand to the state court from which they were removed:

First. Before Judge Duval at the October term, 1879, who denied the motion, giving elaborate reasons. The statement of the case, the grounds of motion, and the reasons of Judge Duval, are reported in 10 Cent. Law J. 47. *Second.* Before Judge Woods, then circuit judge, at the October term, 1880, who also denied the motion, but who afterwards expressed himself as dissatisfied with his decision and suggested a reargument. *Third.* Before me at this term.

Since the decision of Judge Woods, the points involved have been passed upon by the supreme court in the case of *Barney v. Latham*, 103 U. S. 205, with Judge Woods (now Justice Woods) on the bench and not dissenting.

In that case it was decided that under the second clause of the second section of the act of March 3, 1875, when in any suit mentioned

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

therein there is a controversy wholly between citizens of different states which can be fully determined as between them, then either one or more of the plaintiffs or the defendants actually interested in such controversy may, on complying with the requirements of the statute, remove the entire suit.

In these cases under consideration it appears that at the time of application for removal the plaintiffs and all of the defendants, except Morgan C. Hamilton, were citizens of the state of Texas, and that defendant Hamilton was a citizen of New York. It further appears that the suits were actions of trespass to try title to real estate wherein defendant Morgan C. Hamilton is the grantor and warrantor of title to all the other defendants.

Section 4788 of the Revised Statutes of the state provides that—

“When a party is sued for lands the real owner or warrantor may make himself or may be made a party defendant in the suit, and shall be entitled to make such defence as if he had been the original defendant in the action.”

Section 4811 of the same provides that—

“Any final judgment rendered in any action for the recovery of real estate hereafter commenced, shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered,” etc.

Now, as Hamilton was a party entitled to defend and liable to be included by the judgment rendered, there must have been a controversy between him and other parties to the suit. It is easy to see that that controversy was as to whether Hamilton had acquired from his grantor a just title as owner of the property sued for, and was bound to warrant and defend this title of the other defendants. That controversy was between him and citizens of a different state, as all the other parties were citizens of Texas. It was wholly between him and citizens of a different state, as no other defendant appears to have been interested in the controversy except adversely to him. It seems, also, to be clear that the controversy between Hamilton and citizens of a different state was one which could be fully determined as between them. It further is shown that there was a controversy between Hamilton and the other defendants, all citizens of a different state from Hamilton, because it appears that under the statute Hamilton was brought into the case and made a party defendant on the motion of the other defendants.

Counsel very earnestly insists that the plaintiff has no controversy with Hamilton, and asks no judgment nor relief against him. This

may be true, and yet not affect the question, as we have seen in *Barney v. Latham* that if the proper controversy exists, and the proper steps are taken, the entire suit may be removed.

The case as it stands now only differs in condition from the way it was presented to Judge Duval, whose decision I have referred to, in so far as Hamilton's position as a grantor and warrantor differs from what it would be as landlord to the other defendants. Counsel for mover concurs fully in the correctness of the decision rendered by Judge Duval.

An examination of section 4789, Rev. Code of Texas, shows that exactly the same rights are given the landlord in suits for lands as in the same kind of suits are given to owners and warrantors by section 4788 of the same Code hereinbefore cited, and I am unable to see any substantial distinction that can be drawn between the cases. Where the tenant is sued and the landlord is brought in, the whole burden falls on the landlord; and if the plaintiff recovers, while the tenant is evicted, the landlord is bound for his damages. Where the grantee is sued and the warrantor is brought in, the whole burden falls on the warrantor; and if the plaintiff recovers while the grantee is evicted, the warrantor is bound for his damages. In the one case the tenant may recover for his improvements precisely as the grantee may in the other.

The other questions raised on the motion to remand are finally settled by the decision of Judge Duval, *supra*. See *Cole Silver Mining Co. v. Virginia Co.* 1 Sawy. 685.

It is proper to state that counsel have brought and reargued this motion to remand on the suggestion of Judge Woods, and that, therefore, while the motion is denied, the costs made will follow the judgment in the case as finally determined.

Let judgment be entered denying the motion, without costs.

NOTE.

SUITS REMOVABLE. The suits which are removable under this section are suits of a civil nature, at law or in equity, and it does not extend to criminal cases.(a) The fact that the claim is legal as distinguished from equitable has no bearing on the question of the right of removal.(b) So, where an action commenced in a state court in which the distinction between legal and equitable procedure is done away with, is removed, it is removed to that side of the court where appropriate relief can be obtained.(c) The suit must be a suit within the meaning of the state law;(d) and where there is no controversy the suit cannot be removed,(e) as where default has been made.(f)

The jurisdictional limitation as to the amount in controversy has reference to the sum in dispute between the plaintiff and the defendant.(g) The claim of the plaintiff and not the counter-claim of the defendant should fix the amount in dispute;(h) and the petition should affirmatively state the amount;(i) and if the amount in dispute exceeds \$500, exclusive of costs, at the time of the application, the case is removable, although the requisite amount did not exist when the suit was commenced.(j) The sections of the statute of 1875 should be construed together, and the remedy should not be allowed, where the plaintiff is assignee, unless the assignee might have brought suit in the federal court;(k) so, a party cannot acquire the right to remove by purchasing the interest of a co-defendant.(l)

Whenever the decision of a case depends upon the construction of the constitution of the United States, an act of congress, or treaty, the case may be removed if the matter in dispute exceeds \$500.(m) A suit arises whenever upon the whole record there is a controversy involving the construction of either;(n) but they must be directly and not incidentally called in question;(o) and if a suit involves a federal question it may be removed, although other questions founded on principles of general law may be involved;(p) and although a state is plaintiff;(q) and the citizenship of the parties has nothing to do with the question.(r) If the plaintiff is a corporation, created by an act of congress, the case arises under the laws of congress;(s) but it is otherwise in the case of a national bank.(t) Cases involving questions under the bank-

(a) *Rison v. Cribbs*, 1 Dill. 184; *Green v. U. S.* 3 Wall. 653; *State v. Grand Trunk Ry.* 3 Fed. Rep. 887.

(b) *Ketchum v. Black River Lumber Co.* 4 Fed. Rep. 139.

(c) *Benedict v. Williams*, 10 Fed. Rep. 208.

(d) *In re Iowa & M. Const. Co.* 6 Fed. Rep. 799.

(e) *Shumway v. Chicago & Iowa R. Co.* 4 Fed. Rep. 385; *Fashnacht v. Frank*, 23 Wall. 416.

(f) *Berrian v. Chetwood*, 9 Fed. 678.

(g) *N. Y. Silk Manuf'g Co. v. Second Nat. Bank*. 10 Fed. Rep. 204.

(h) *Falls Wire Manuf'g Co. v. Broderick*, 6 Fed. Rep. 654. *Contra, Clarkson v. Manson*, 4 Fed. Rep. 257.

(i) *Keith v. Levi*, 2 Fed. Rep. 743.

(j) *Clarkson v. Manson*, 4 Fed. Rep. 257.

(k) *Berger v. Douglas Co.* 5 Fed. Rep. 23.

(l) *Temple v. Smith*, 4 Fed. Rep. 392.

(m) *Gold Washing & W. Co. v. Keyes*, 96 U. S. 199; *Woolridge v. McKenna*, 8 Fed. Rep. 650; *Connor v. Scott*, 4 Dill. 242; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135.

(n) *Cohens v. Virginia*, 6 Wheat. 264; *Mayor of N. Y. v. Cooper*, 6 Wall. 247; *Tennessee v. Davis*, 100 U. S. 275; *Van Allen v. Atchison, C. & P. R. Co.* 3 Fed. Rep. 645; *Hatch v. Wallamet Iron B. Co.* 11 Law Rep. (N. S.) 630.

(o) *State v. Bowen*, 8 Rich. (N. S.) 382.

(p) *Connor v. Scott*, 4 Dill. 242.

(q) *New Orleans, M. & T. R. Co. v. State*, 13 Chl. Leg. News, 93.

(r) *Wilder v. Union Nat. Bank*, 12 Chl. Leg. News, 76.

(s) *Union Pac. R. Co. v. Maccomb*, 1 Fed. Rep. 799.

(t) *Pettilon v. Noble*, 7 Biss. 449.

rupt act are removable;(u) or cases under the homestead laws of the United States;(v) or under the act of congress respecting customs and duties;(w) but the erroneous levy of state taxes does not involve a federal question.(x)

The first clause of this section relates only to cases where there is a single individual controversy, and in which all the parties on the moving side are necessary parties, when all must unite.(y) The requisite citizenship must exist at the time of filing the petition(z) as well as at the commencement of the suit.(a) The circuit court, under this clause, has no jurisdiction between a citizen of one state and citizens of the same state and another state;(b) so, where there were three defendants, one being a citizen of the state with the plaintiff, the case was not removable.(c) In a suit between a foreign citizen and citizens of various states the removal was allowed where all but one of the defendants applied;(d) so it was held that the objection to the removal, founded on the citizenship of one of the parties, is not favored after an expiration of 18 months.(e) A suit brought by a citizen of another state against a citizen of England may be removed.(f) The citizenship of an infant governs the right of removal of a cause brought by his regular guardian, his guardian *ad litem*, or his next friend.(g) A bill to compel a trustee to apply the income to pay the debts of the *cestui que trust*, and the latter is a non-resident, may be removed.(h) The citizenship of a railroad company is not changed by the leasing of a road in another state;(i) and in a suit to enjoin the execution of the lease, the president and directors are not such necessary parties as will prevent a removal for their non-joinder.(j) For the purposes of jurisdiction, a corporation is considered a citizen of the state which created it, and not of the state under whose laws it has entered to operate in its line of business;(k) but if the effect of state legislation be to adopt the corporation, it becomes, for the purposes of jurisdiction, a corporation created by the state so adopting it, and it cannot remove a cause brought in such state.(l)

The second clause, however, contemplates cases in which there are persons whose presence is not necessary to the determination of the controversy, when

(u) Connor v. Scott, 4 Dill. 242; Houser v. Clayton, 3 Woods, 273; Hebert v. Lefevre, 31 La. Ann. 363.

(v) Van Allen v. Atchison, C. & P. R. Co. 3 Fed. Rep. 545.

(w) Orner v. Saunders, 3 Dill. 284.

(x) Berger v. Douglas Co. 5 Fed. Rep. 23

(y) Buckman v. Pallsades Land Co. 1 Fed. Rep. 367; Ruble v. Hyde, 3 Fed. Rep. 330; Smith v. McKay, 4 Fed. Rep. 353; Smith v. Horton, 7 Fed. Rep. 270; Removal Cases, 100 U. S. 457; Nat. Bank v. Dodge, 2 Int. Rev. Rec. 304.

(z) Curtin v. Decker, 5 Fed. Rep. 385; Boede v. Cheeney, Id. 388.

(a) Bruce v. Gibson, 9 Fed. Rep. 540.

(b) Karns v. Atlantic & O. R. Co. 10 Fed. Rep. 309. Nor of a suit brought by an alien against an alien. Sawyer v. Switzerland M. Ins. Co. 14 Blatchf. 451; Barrow Cliffe v. La Caisse Generale, 58 How. Pr. 131; Orosco v. Gagliardo, 22 Cal. 83.

(c) Hanover F. Ins. Co. v. Keogh, 7 Fed. Rep. 764.

(d) Cooker v. Seligman, 7 Fed. Rep. 263.

(e) Van Allen v. Atchison, C. & P. R. Co. 3 Fed. Rep. 545.

(f) Eureka Consol. M. Co. v. The Richmond Consol. M. Co. 2 Fed. Rep. 829. Contra, under section 639, Denniston v. Potts, 19 Miss. 36.

(g) Woolridge v. McKenna, 8 Fed. Rep. 650.

(h) Broadway Bank v. Adams, 130 Mass. 431.

(i) Baltimore & O. R. Co. v. Koontz, 3 Morr. Trans. 34.

(j) Pond v. Sibley, 7 Fed. Rep. 129; Nat. Bank of Lyndon v. Wells Riv. Manuf'g Co. 7 Fed. Rep. 750.

(k) Williams v. Missouri, K. & T. R. Co. 3 Dill. 267; Missouri, Kans. & T. R. Co. v. Texas & St. Louis R. Co. ante, 497; and see Baltimore & O. R. Co. v. Cary, 23 Ohio-St. 208; Allegheny Co. v. Cleveland & P. R. Co. 51 Pa. St. 228.

(l) Uphoff v. Chicago, St. L. & N. O. R. Co. 5 Fed. Rep. 545; Johnson v. Phila. W. & B. R. Co. 9 Fed. Rep. 6; and see Chicago & W. I. R. Co. v. L. S. & M. S. R. Co. 5 Fed. Rep. 19. As to con-

either one or more of the co-parties may petition for a removal,^(m) although the party applying obtained his interest in the property by a conveyance made for the express purpose of conferring jurisdiction; but the conveyance must be *bona fide*.⁽ⁿ⁾ Under this clause each individual plaintiff must be a citizen of a state different from that of each individual defendant.^(o) The case may be removed where the parties applying have interpleaded,^(p) as where intervenors charge fraud and want of jurisdiction.^(q) Either one or more may apply for a removal, although other parties are citizens of the same state with those on the opposite side.^(r) The parties may be so transposed on opposite sides according to their real interests, without regard to their former position on the record, as to effect a determination of their rights.^(s) There may be a removal of that part of a cause which concerns the original parties, notwithstanding that a state statute may declare that the trial as to certain other parties cannot be separated from the trial of the main cause.^(t) Where the action was by a citizen of the state against several defendants, and the circuit court had jurisdiction from the amount in controversy, any one of the defendants may apply for a removal if the matter can be fully determined between them;^(u) but the controversy must be wholly between them;^(v) and the whole suit must be removed;^(w) for, if not wholly between them, it cannot be removed although the controversy of the defendant could be disposed of separately.^(x) The suit may be removed although it does not arise under the constitution, treaties, or laws of the United States;^(y) and irrespective of its quality as equitable or legal;^(z) or although there may be other controversies in the suit between other parties;^(a) or, although the controversy removed is only incidental, as the removal takes the principal controversy and all other controversies to the circuit court;^(b) or although one of the controversies taken

solidated railroad companies generally, consult *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286; *Balt. & O. R. Co. v. Harris*, 12 Wall. 65; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270; *Williams v. Missouri, K. & T. R. Co.* 3 Dill. 267; *Marshall v. Balt. & O. R. Co.* 16 How. 314; *Same v. Gallahue's Adm'rs*, 12 Gratt. 658; *Chicago & N. W. R. Co. v. Chicago & P. R. Co.* 6 Biss. 219; *Minot v. Phila. W. & B. R. Co.* 2 Abb. (U. S.) 323.

(m) *Smith v. McKay*, 4 Fed. Rep. 363.

(n) *Hoyt v. Wright*, 4 Fed. Rep. 168.

(o) *Burke v. Flood*, 1 Fed. Rep. 641; *S. C. 4 Pac. C. L. J.* 501; *Van Brunt v. Corbin*, 14 Blatchf. 496; *In re Frazier*, 10 Chic. L. N. 390; *Ruble v. Hyde*, 3 Fed. Rep. 330.

(p) *Burdick v. Peterson*, 6 Fed. Rep. 840; *Tower v. Ficklin*, 60 Ga. 373; *Healy v. Provost*, 25 Int. Rev. Rec. 240. See *Postmaster General v. Cross*, 4 Wash. C. C. 326; *Martin v. Taylor*, Id. 1.

(q) *Boone v. Iowa & M. Const. Co.* 10 Fed. Rep. 401; *In re Iowa & M. Const. Co.* 10 Fed. Rep. 401.

(r) *Girardey v. Moore*, 3 Woods, 397; *Nat. Union Bank v. Dodge*, 25 Int. Rev. Rec. 304. See *Shepard v. K. N. L. Pack Co.* 12 Chi. Leg. News, 220.

(s) *Burke v. Flood*, 1 Fed. Rep. 541.

(t) *Ellerman v. New Orleans M. & T. R. Co.* 2 Woods, 120.

(u) *McLean v. Chicago & St. P. R. Co.* 16 Blatchf. 319; *Taylor v. Rockefeller*, 6 Fed. Rep. 226; *Stapleton v. Reynolds*, 9 Chi. Leg. News, 33; *Evans v. Faxon*, 10 Fed. Rep. 312; *Hervey v. Illinois & Midland R. Co.* 7 Biss. 103; *Girardey v. Moore*, 3 Woods, 397; *First Presb. Soc. of G. B. v. Goodrich T. Co.* 7 Fed. Rep. 257.

(v) *Evans v. Faxon*, 10 Fed. Rep. 312; *Walsh v. Memphis, C. & N. W. R. Co.* 6 Fed. Rep. 797; *McLean v. St. Paul & Chicago R. Co.* 16 Blatchf. 309; *Ellerman v. New Orleans, M. & T. R. Co.* 2 Woods, 120; *Smith v. St. Louis M. L. Ins. Co.* 2 Tenn. Ch. 656; *First Presb. Soc. of G. B. v. Goodrich T. Co.* 7 Fed. Rep. 257.

(w) *Carraher v. Brennan*, 7 Biss. 497; *Board v. Kan. Pac. R. R.* 4 Dill. 277; *Burch v. Des Moines & St. P. R. Co.* 46 Iowa, 449; *Barney v. Latham*, 11 Law Rep. (N. S.) 93; *Chicago v. Gage*, 6 Biss. 467.

(x) *Girardey v. Moore*, 3 Woods, 397.

(y) *Low v. Wayne Co. Sav. Bk.* 14 Blatchf. 449.

(z) *Ketchum v. Black River Lum. Co.* 4 Fed. Rep. 139.

(a) *Hervey v. Illinois M. R. Co.* 7 Biss. 103; *Bybee v. Hawkett*, 5 Fed. Rep. 1; *Stevens v. Richardson*, 9 Fed. Rep. 191; *Evans v. Faxon*, 10 Fed. Rep. 312.

(b) *Farmers' L. & T. Co. v. C., P. & S. R. Co.* 12 Chi. Leg. News, 65

along be between citizens of the same state.(c) The removal of the suit as to one defendant removes it as to all;(d) and all the defendants need not join.(e) The right of removal in such cases is on the condition that the case can be wholly determined as to the parties;(f) so, if three separate actions are brought, and the same defence is made in each, and a judgment in one will determine the whole controversy, they may be removed if the joint amount incontrovertibly exceeds \$500.(g) Where five attachments were separately sued out against one stock of goods, the question of ownership is a single controversy.(h) Where there is no separate controversy between the resident plaintiffs and the non-resident defendants, the cause cannot be removed;(i) so, if supplementary proceedings are inseparably connected with the original judgment or decree, they cannot be removed; but it is otherwise where they are a mere mode of procedure or relief involving an independent controversy with new or different parties.(j)—[ED.]

(c) *Sheldon v. Keokuk N. W. Line Pack. Co.* 1 Fed. Rep. 789.

(d) *Stapleton v. Reynolds*, 9 Chi. Leg. News, 33.

(e) *Stapleton v. Reynolds*, 9 Chi. Leg. News, 33; *Davis v. Cook*, 9 Nev. 134.

(f) *Carragher v. Brennan*, 7 Biss. 497; *Ellerman v. New Orleans, M. & T. R. Co.* 2 Woods, 120; *Smith v. St. Louis M. L. Ins. Co.* 2 Tenn. Ch. 656; *Smith v. McKay*, 4 Fed. Rep. 353;

Hervey v. Illinois M. R. Co. 7 Biss. 103; *Chicago v. Gage*, 6 Biss. 467; *Osgood v. Chicago, D. & V. R. Co.* 6 Biss. 330; *Board v. Kansas Pac. R. Co.* 4 Dill. 277; *Burnham v. D. & M. R. Co.* 4 Dill. 563.

(g) *Anderson v. Gerding*, 3 Woods, 487.

(h) *Temple v. Smith*, 4 Fed. Rep. 392.

(i) *Ruble v. Hyde*, 3 Morr. Trans. 516; affirming 3 Fed. Rep. 330; *Barney v. Latham*, 103 U. S. 205.

(j) *Buford v. Strother*, 10 Fed. Rep. 406.

MOCH and another v. VIRGINIA FIRE & MARINE INS. Co.

(Circuit Court, E. D. Virginia. February, 1882.)

1. JURISDICTION—RES ADJUDICATA.

Where a court of general jurisdiction in another sovereignty has passed upon the question of its own jurisdiction, when expressly raised by plea and necessarily considered in giving judgment, the parties to such suit are bound in a home court under the principle of *res adjudicata*.

2. SAME—FOREIGN JUDGMENT—ESTOPPEL.

In such a suit against an insurance company in a home court on a judgment from a court of another sovereignty, though the court may look behind the judgment of the court *a quo* into the question of the jurisdiction of that court over the subject-matter or parties, and into the validity of the process by which suit there was commenced; yet this power does not, as of course, relieve parties to the suits from the operation of the principle of *res adjudicata*.

3. INSURANCE COMPANY—NON-RESIDENT—SERVICE OF PROCESS ON RESIDENT AGENT.

An insurance company, chartered and resident in one state, which does business in another state through an agent there, who receives risks, collects premiums, signs and delivers policies, and transacts the business usually done by the resident agent of a non-resident corporation, may be sued in that state, if its statute law does not forbid, by the service of process on that agent, whether he has express power of attorney to receive or accept such service or not.

4. SAME—STATE LAW AS TO NON-RESIDENT CORPORATIONS.

And this is especially so where a law of such state requires every non-resident insurance company to have at least one agent in the state empowered to receive service of process, and requires *every* agent who receives risks, or collects premiums, or transacts business for such company, to have a certificate of such warrant.

5. PRACTICE—PLEA TO JURISDICTION—DECISION ON, IS BINDING EVERYWHERE.

A peremptory exception, such as is used in the practice in Louisiana, which denies that a resident agent of a non-resident insurance corporation is such an agent as that service upon him of process for commencing a suit will bring the corporation into court, is equivalent to the common-law plea to the jurisdiction; and, although it alleges that the defendant corporation appears "alone to file it," it submits the question of jurisdiction to the court in such manner that judgment against the defendant, upon it there, by a court of general jurisdiction, binds the defendants everywhere.

This is an action brought upon a judgment for \$3,000, with interest and costs, obtained by the plaintiff against the defendant in the district court of the parish of Caddo, Louisiana, on the twelfth of April, 1879. The judgment in Louisiana was obtained on a policy of fire insurance issued by the defendant to the plaintiff, through John W. Taber, its agent at Shreveport. Process there was issued on the seventeenth of January, 1879, against the defendant company, "through its agent, John W. Taber," and was served on Taber. The

policy of insurance sued upon there was signed by the chief officers of the company in Richmond, Virginia, and was countersigned by "Douglas West, general agent," and by "John W. Taber, agent." The petition (declaration) averred that the contract of insurance had been made through Taber, as agent of defendant. The term of the court at which the judgment in Louisiana was rendered, began on Monday, the seventh of April, 1879. On the next day, the 8th, there was an entry of "default." On the twelfth of April the defendant appeared, as shown in the following entry:

"Now comes the defendant by attorney, who appears alone to file this exception, and alleges that this court is without jurisdiction to try this suit: (1) Because the defendant has not been legally cited to answer the demand of the plaintiff. (2) Because the person upon whom citation is alleged to have been served is not now, and never was, such agent of the defendant as that service of citation upon him would bind the said defendant or bring it into court. Wherefore, the defendant prays that this suit be dismissed at plaintiff's cost.

"DUNCAN & MONCURE, Attorneys for Defendant."

On the same day, the twelfth of April, judgment was entered in the following terms:

"In this cause, by reason of the judgment by default regularly taken, and not having been set aside, and the plaintiffs having proven their demands, the law and the evidence being in favor of plaintiffs and against defendant, it is hereby ordered, adjudged, and decreed that the plaintiffs do have and recover of defendant the full sum of \$3,000, with 5 per centum per annum thereon from judicial demand, January 15, 1879, and all costs. Done," etc.

There was no appeal to a higher court from this judgment, and it stands unreversed in the court in which it was rendered.

A statute of Louisiana, approved February 26, 1877, and still in force, provides in the first section as follows:

"1. Be it enacted, etc., that no insurance company organized under the laws of any other state or any foreign government, shall, directly or indirectly, take risks or transact any business through an agent in this state until such insurance company shall have filed in the office of the secretary of state a certified copy of the vote or resolution of the trustees or directors of said company appointing such agent to transact business and take risks, accompanied by a warrant of appointment under the official seal of the company, and signed by the president and secretary. Such warrant shall continue valid and irrevocable until another agent shall be substituted, so that at all times, while any liability remains outstanding, there shall be within this state an agent or attorney aforesaid; and such warrant shall not be valid unless it contains a consent expressed that service of legal process, original, mesne, or final, on such agent shall be taken and held as valid as if served on the company, and

that acknowledgment of service of such process by him, for or on behalf of such company, shall be obligatory on it, and that judgment recovered on such service or acknowledgment shall be conclusive evidence of the indebtedness of the company.

* * * * *

"4. Be it further enacted, that any person who shall, after the first day of April, 1877, act as agent of any insurance company not incorporated by the laws of this state, in taking any risks, or transacting any business, or receiving any premiums on policies issued or to be issued, without an appointment made and filed in accordance with the provisions of this act, shall be deemed guilty of a misdemeanor, and punished with fine and imprisonment, or both, at the discretion of the court."

Upon the judgment in Louisiana, thus described, suit was brought in this court, the defendant company having its principal office and officers in Richmond.

The defendant pleaded in substance:

(1) That it had complied fully with the law of Louisiana, requiring, among other things, of non-resident insurance companies the appointment of a *general* agent, authorized to receive and acknowledge service of process.

After setting out in detail the provisions of the law, and averring a compliance with them by the defendant, the plea avers that the *general* agent appointed by it was one Douglas West, and that no other person had authority to accept or receive service of process in its behalf.

The defendant furthermore pleaded in substance:

(2) That the said John W. Taber, mentioned in the record as having been served with process in the suit in Louisiana, and alleged to be defendant's agent, was not its agent, and had not been appointed by it for such purpose, and had no authority nor power to receive service of said process in behalf of the defendant, and that notice to the defendant through said Taber as its agent was illegal and futile, and without its authority.

To these pleas the plaintiff replied in substance:

(1) That the defendant ought not to be admitted to plead the said plea because the record of the suit in Louisiana shows that citation to answer the plaintiff's demand having been duly served on an agent of the defendant, pursuant to the laws of Louisiana, and the defendant having appeared, as shown by the record, did then and there plead that it had not been legally cited, and that the person upon whom process was served was not such an agent of defendant as that such service of process would bind the defendant to bring it into court, which said matters and things were the same as are now pleaded here; and that thereupon the court in Louisiana adjudged that the defendant had been legally cited, and that the person upon whom process was served

was such an agent as that such service of process would bind said defendant to bring it into court; and so, that the defendant is bound and concluded by said judgment, and estopped by said judgment to plead here anew the matters and things passed upon and determined there.

The plaintiff furthermore replies:

(2) That the defendant is estopped from pleading that John W. Taber was its agent, that plea having been pleaded in the suit in Louisiana and determined against it.

To this replication the plaintiff demurred.

Legh R. Page and Frank W. Christian, for plaintiff.

Wm. W. & Beverly T. Crump, for defendant.

HUGHES, D. J. This case is before me now on the defendant's demurrer to the plaintiff's replication. Avoiding technicalities, the plaintiff's contention is that the defendant was properly sued and brought into court in Louisiana by service of process upon such an agent of the defendant, John W. Taber, as could be served with the process under the laws of that state; that, besides, the defendant appeared to the suit there, pleaded defective service of process, claimed that it was not in court, and was overruled on that issue thus raised by itself, by a court of general and competent jurisdiction, and is therefore estopped from pleading the same matters here.

The contention of the defendant, technically alleged by its plea and set out argumentatively in the very able and learned brief of counsel, is that the citation served on Taber was insufficient to bring it into court; that its appearance there was only for the purpose of suggesting to the court its want of jurisdiction because of the matters alleged in its "exception" filed there; that it is not bound by the judgment of the court on that or any other question; and that the judgment is a nullity, and would be treated as such in Louisiana, and should be so treated here.

The first question presented to me, though it is not the pivotal one in this case, is whether the "exception," the "peremptory exception," used in the practice of Louisiana, is to be treated in common-law courts as a plea by which the defendant sets out matters of law and fact in defence of the action, and submits himself to the judgment of the court upon them, or is a mere suggestion or protest of record by which the defendant commits himself to nothing at all; as to which it matters not at all to him whether the court considers and passes upon it or not, and which, when entered of record, is a matter of futile surplusage.

Without meaning to refer to such "exceptions" in general, I have to say that, for reasons given in the sequel, I cannot take the latter view of the peremptory "exception" which was pleaded in the suit between these parties in Louisiana, the judgment in which is sued upon here. The Code of Practice in Louisiana defines peremptory exceptions to be "those which tend to the dismissal of the suit;" some of them relating to forms, others arising from the law. The exception in this case tended to the dismissal of the suit on the ground that, as a matter of law, the defendant could not be brought into court by service of process upon the agent who, as the petition alleged and the exception did not deny, negotiated the insurance, received the premiums, delivered the policy, and was the acting agent of the defendant in the city of Shreveport; could not, for the reason that he was not what the plea calls the "general" agent of the company in Louisiana, appointed in accordance with the law concerning non-resident insurance companies enacted in 1877.

I consider that such was the matter of law formally submitted for decision on the twelfth of April, 1879, by defendant's counsel in the exception set out in the record; and though the court, in its judgment rendered on that day, probably after argument on the exception, does not expressly declare that the exception was formally overruled, yet that it was overruled is a necessary implication from the tenor of the judgment.

The court of Louisiana having decided that the defendant was before it by force of the service of citation on its agent, Taber, and not merely by its appearance "alone to file" the exception, it may not be competent for me to pass upon the propriety of that decision; but I feel bound by the earnestness of defendant's contention to look behind the judgment of the court *a quo*, into the validity of the process by which the defendant was held to have been brought into court.

That a corporation doing business in a state other than that from which its charter is derived, and in which its principal office is held and its chief business is conducted,—doing business there and everywhere else, as corporations must of necessity do, through the agency of natural persons,—may be sued and brought into court in that state by the service of process on its agent there, independently of any statute law or warrant of attorney expressly authorizing such service, has been very authoritatively decided.

The case of *Moulin v. Ins. Co.* 1 Dutcher, 57, was similar to the one at bar in its essential features, except that there, there was no

conditional appearance in the original suit by the defendant. The defendant was a corporation chartered in New Jersey, and having its principal office there. It established a branch office in Buffalo, New York, and did business there for awhile, but finally withdrew that office. Suit was afterwards brought against it there, on one of the policies issued from that agency, and process was served on its president, who was a resident of New Jersey and was casually in Buffalo, not on the business of his company. On the judgment obtained in the New York suit thus commenced, suit was brought in New Jersey. The pleadings in this latter suit were substantially identical with those in this, except as to the conditional appearance. The opinion was delivered by Chief Justice Green, who said:

“If a corporation may sue within a foreign jurisdiction it should seem consistent with sound principle that it should also be liable to be sued within such jurisdiction. The difficulty is this: that process against a corporation at common law must be served upon its principal officer within the jurisdiction of that sovereignty by which it was created. The rule is founded upon the principle that the artificial, invisible, and intangible corporate body is exclusively the creature of the law; that it has no existence except by operation of law; and that, consequently, it has no existence without the limits of that sovereignty, and beyond the operation of those laws by which it was created and by whose power it exists. The rule rests upon a highly artificial reason, and, however technically just, is confined at this day, in its application, within exceedingly narrow limits. A corporation may own property, may transact business, may contract debts; it may bring suits, it may use its common seal, nay, it may be sued within a foreign jurisdiction, provided a voluntary appearance is entered to the action. It has, then, existence, vitality, efficiency, beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised. If it be said that all these acts are performed by its agents, as they may be in the case of a private individual, and that the corporation itself is not present, the answer is that a corporation acts nowhere except by its officers and agents. It has no tangible existence except through its officers. For all practical purposes its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it. It may perform every act without the jurisdiction of the sovereignty which created it, that it may within it. Its existence anywhere and everywhere is but ideal. It has no actual personal identity and existence as a natural person has; no body which may exist in one place and be served with process, while its agents and officers are in another. Process can only be served upon the *officers* of a corporation within its own jurisdiction, not upon the corporation itself.

“Process cannot be served upon the officer of a corporation in a foreign jurisdiction, because he does not carry his official character and functions with him; and yet the officers and agents of corporations carry their official character and functions with them into foreign jurisdictions for the purpose of making contracts and transacting the business of the corporation. The seal

of a corporation, its distinguishing badge, at common law the only evidence of its contracts, may be taken by its officers and used within a foreign jurisdiction.

"Doubts were formerly entertained whether a corporation could make a contract or maintain an action out of its own jurisdiction. These questions have been long since settled, either by judicial construction or legislative enactment, in accordance with the reason of the thing and usage of the commercial world. Sound principle requires that while the *powers* of corporations are world-wide, while for all practical purposes they may exist and act everywhere, the technical rule of the common law, that they exist only within the jurisdiction of the sovereignty which created them, should be applied only within its strictest limits, and not be suffered to defeat the obvious claims of justice. * * *

"The question now before the court is not upon the validity of the common-law principle; to that we adhere. * * * The utmost that can be said is that [the service in the suit in New York] was a deviation from the technical rule of the common law. The defendants were not condemned unheard, and without an opportunity of making defence. The process was served precisely upon the officer, and in the mode that it would have been had the process been served in this state. The corporation, it is true, were drawn into the forum of a foreign sovereignty to litigate, but, having voluntarily entered that jurisdiction and transacted business there; having invoked the comity and the protection of the laws of that sovereignty for their benefit,—can they complain that the contracts there made are enforced within that sovereignty and in accordance with its laws? Does it involve the violation of any principle of natural justice, or that protection which is due to the citizens of our own state? If the corporation were carrying on its business within the state of New York at the time of the service of the process, this court has already intimated its opinion that the service would be valid. In 4 Zab. 234, Justice Elmer said: 'I think, under such circumstances, natural justice requires that corporations should be subject to the laws of the state whose comity they thus invoke. For the purpose of being sued, they ought to be regarded as voluntarily placing themselves in the situation of citizens of that state. And such, it seems, would be the rule, independently of any express statute authorizing the mode of serving process. Angell & Ames, Corp. § 402. The fact that the corporation had ceased to transact business, whatever technical difficulty it may seem to create, cannot alter the reason and justice of the proceeding.'"

The learned judge distinguishes, of course, between corporations and natural persons, and applies his reasoning only to the former. He treats the existence of the New York statute, authorizing the service of process on the officer of a non-resident corporation casually in that state, as not affecting the decision of the court of New Jersey in the case. See *Bushel v. Com. Ins. Co.* 15 Serg. & R. 176, and Angell & Ames, § 402.

The doctrine thus ably laid down by Chief Justice Green has been sanctioned by the congress of the United States, as to the District of

Columbia, by section 11 of chapter 64 of the acts 1867, (14 St. at Large, 404,) which provides that, in actions against foreign corporations brought in the district, all process may be served upon the agent of such corporation or person conducting its business in the district.

And in *Railroad Co. v. Harris*, 12 Wall. 65, Mr. Justice Swayne, speaking for the United States supreme court, said: A corporation "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. *If it do business there, it will be presumed to have consented, and will be bound accordingly.*" This language was cited with approbation and adopted as a correct exposition of the law by the same court in *Ry. Co. v. Whitten*, 13 Wall. 270, and in *Ex parte Schollenberg*, 96 U. S. 376.

The case of *Michael v. Ins. Co. of Nashville*, 10 La. Ann. 737, which was decided in 1855, (before the statute of 1877,) sustains the decision in *Moulin v. Ins. Co.*, rendered in the same year. In it the supreme court of Louisiana not only held that a non-resident corporation could be sued through its resident agent, but that this right could not be destroyed by a revocation of the powers of an agent previously to a suit. The policy sued upon in that case covered the year 1852. The property insured was burned in August of that year. Suit was brought on the fourteenth of October following, and citation served on W. A. Johnson, the agent through whom the policy was taken, in November, 1852. By its exception, the defendant pleaded that the "agency of said insurance company in New Orleans had been some time since withdrawn." In support of the exception a telegraphic dispatch was proved, dated at Nashville on the twenty-ninth of September, 1852, and received the same day, declaring that the company had withdrawn its agency from New Orleans, and directing that risks should be declined after the first of October ensuing. The court held that the service of process was valid and effective.

The case of *Wright v. Liverpool, L. & G. Ins. Co.* 30 La. Ann. 1186, is an authority only apparently contrary to this principle. It arose before the statute of 1877. It decided that a foreign corporation, represented by a general agent and local board of directors residing in New Orleans, could not be brought into court by a citation served on a local agent domiciled in one of the county towns of Louisiana, who was only authorized to receive applications for insurance and give binding receipts for the same, and who had not exercised or rep-

resented that he possessed any other authority. But in that case the corporation, by having a principal office, a general agent for all purposes, and a local board of directors in New Orleans, was practically domiciled there, and there was no hardship in requiring service of process to be made on its general agent. It was, besides, proved affirmatively that the agent in the interior had no other authority, and was known to have none other, than to take risks.

On the general principles so ably enforced by Chief Justice Green, I would not feel justified in treating as a nullity the judgment of the court of Louisiana virtually establishing the validity of the service of process on the business agent of a non-resident insurance company, issued to commence a suit founded on a transaction with that agent, even if there were no statute in Louisiana authorizing such service. But the statute of that state, passed in 1877, comes in aid of the general principle, and seems to have expressly rendered such an agent as Taber was, amenable to the process which was served on him. Though the last clause of the first section of that act seems to imply that some one agent of every non-resident insurance company shall be the person empowered to be served with and to accept service of process for the whole state, yet the act speaks nowhere of a "general" agent, as the defendant's plea does; and the first clause of section 1 and the whole tenor of section 4 unite in providing that every agent who does business for a non-resident insurance company in the state, either in taking risks, or receiving premiums, or transacting any business, shall first have been appointed and empowered respecting process, as provided in the first section. If so, then Taber must be presumed to have been so empowered, and the defendant would not be heard to deny that it has, in respect to him, complied with the requirements of the statute. For a corporation to seek to avoid its own contract by reason of a *misnomer* is reprehended by Lord Coke as a pernicious novelty, which "till this generation of late times was never read of in any of our books." *Sir Moyle Finch's Case*, 6 Rep. 65a. Surely a corporation's neglect to produce a certificate necessary to vindicate itself and its agent from crime, should not be allowed to exempt it from liability for that agent's acts.

There is abundant authority to show that a suit may be maintained upon a foreign judgment recovered in a country of which the defendant, even though a natural person, was a citizen or resident, according to the laws of that country, though process was never in fact served upon him at all; and that such a judgment will not be deemed void as repugnant to natural justice.

In *Douglas v. Forest*, 4 Bing. 686, the court of common pleas held that an action may be maintained in England, upon a Scotch judgment, recovered upon a debt contracted in Scotland by a native of that country, though the defendant was abroad when the cause of action accrued, though no process was served upon him, and though he never knew of the existence of the action. The laws of Scotland allowed such a suit as that in which the Scotch judgment was rendered.

In *Bank of Australia v. Nias*, 16 Ad. & Ell. 717, it appeared that the statute of a British colony authorized suits against members of a corporation individually for liabilities of the corporation collectively, in a manner unknown to the laws of England, and seemingly repugnant to natural justice. But in an action in England, brought on a foreign judgment against one corporator, founded on such a liability, it was held that a plea setting out such a fact is insufficient.

In *Becquet v. McCarthy's Ex'r*, 2 Barn. & Ad. 951, it appeared that the statute law of a British colony authorized that in suits against absent parties to contracts made in the colony, process might be served on the attorney general of the colony. In a suit in England upon a colonial judgment obtained after such service of process, it was held that such a law did not render void the judgment.

In *Godard v. Gray*, L. R. 6 Q. B. 139, decided in 1870, where the contract sued upon abroad was made in England, and the foreign judgment obtained upon it was rendered on a misconstruction of the contract; yet, in a suit in England upon this judgment, the court held that the facts could not be gone into. See, also, *Schibsby v. Westminster*, L. R. 6 Q. B. 155.

The defendants in these several cases were held to be estopped by the judgments of courts of competent jurisdiction abroad.

The whole subject of foreign judgments *in personam*, in their relation to the question of estoppel, has been so fully discussed in Bigelow on Estoppel that I need not do more than refer to the many cases cited below and in that work. The author concludes his review of the subject by the remark that although parties to a foreign judgment are not ordinarily estopped to deny the jurisdiction of a foreign court, yet if, in any case, there had been an issue made in the foreign suit between the parties, on this particular point, (as was done in Louisiana between the parties to this suit,) and this issue was decided in favor

of the jurisdiction, the decision would probably bar a retrial of the same question in another forum between the same parties.

I admit that the law on the power of a court to inquire into the jurisdiction of a foreign court over parties defendant is very unsettled. This question and those of *res judicata* and estoppel have been considered or passed upon, severally or together, in 1 Kent, Comm. 261, 262, and notes; Story, Conf. Laws, § 608, references and note; 1 Rob. Pr. 219; 6 Rob. Pr. 437; 7 Rob. Pr. 109; 1 Smith, Lead. Cas. 1118-1146; 2 Smith, Lead Cas. 828; Judge Moncure's opinion in *Bowler v. Huston*, 30 Gratt. 266; note to *Shuman v. Stillman* (from 6 Wend. 447) in 15 Am. Dec. 378; note to *Pixley v. Winchell* (7 Cow. 366) in 17 Am. Dec. 525; note to *Messier v. Goddard* (7 Yeates, 533) in 1 Am. Dec. 325; *Benton v. Burgot*, 10 Serg. & R. at 241; *Rocco v. Hackett*, 2 Bosw. 579; *Imrie v. Castrique*, 8 Com. B. (N. S.) 405; S. C. in error, L. R. 4 H. of. L. 414.

The act of congress of May 26, 1790, c.11, (1 St. at Large, p.122,) provides that the records and proceedings of the courts of the several states, properly authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are taken. It was passed in pursuance of section 1 of article 4 of the constitution of the United States. It not only provides that such records shall be received as *evidence*, but, if in the state where judgment was rendered, it was evidence of the highest nature, namely, *record evidence*. This act of congress in declaring it to be the highest evidence, declared the *effect* which the judgment was to have in all the courts of the United States. The principal federal authorities on this subject are *Mills v. Duryea*, 7 Cranch, 383-4; *Hampton v. McConnell*, 3 Wheat. 234; *Knowles v. Gas-light & Coke Co.* 19 Wall. 58; *Thompson v. Whitman*, 18 Wall. 457; *Hill v. Mendenhall*, 21 Wall. 453; *Lafayette Ins. Co. v. French*, 18 How. 404; *Williamson v. Berry*, 8 How. 496, 540; *Glass v. Sloop Betsey*, 3 Dal. 7; *Rose v. Himely*, 4 Cranch, 241; *Elliott v. Piersol*, 1 Pet. 328; *Schrivver's Lessee v. Lynn*, 2 How. 59; *D'Arcy v. Ketchum*, 11 How. 165; *Webster v. Reid*, 11 How. 437; *Nations v. Johnson*, 24 How. 195; *Christmas v. Russell*, 5 Wall. 291, 305; *Pennoyer v. Neff*, 95 U. S. 714. And on the subject of service of process on a corporation chartered in another sovereignty, see *Railroad Co. v. Harris*, 12 Wall. 65; *Railroad Co. v. Whitton*, 13 Wall. 270; and *Ex parte Schollenberger*, 96 U. S. 369.

It does not follow, however, that even though a home court may inquire into the jurisdiction of the court of another sovereignty, therefore the parties to a litigation there are not bound in the home court by the principle of *res judicata*. The two questions are distinct and should not be confounded. Whether or not Taber was "such an agent of the defendant as that service of citation upon him would bind the defendant and bring it into court," was the precise question presented to the court in Louisiana, not only *in ipsissimis verbis* by the defendant's exception, but by the showing of the record; and was the only question open to debate; for the proofs were apparently conclusive on the merits. This question was not only decided by the Louisiana court, but I think rightly decided, the court holding properly that the corporation was before it as defendant to the action, as well as before it for the special purpose of pleading to the jurisdiction.

Now, it is not denied that the court whose judgment I am considering was one of general jurisdiction, and, as such, competent to pass upon the validity of process issued by its clerk to bring a defendant before it; and there is very high authority, both in Louisiana and Virginia, holding that when such a court passes upon a question within its competency, in a litigation between two parties, those parties are concluded in every other court but an appellate one on that question.

In the case of *Verneuil v. Harper*, 28 La. Ann. 893, there had been a proceeding by Feitel against *Verneuil* to revive a judgment obtained nine years before, to which an exception had been filed by *Verneuil*, denying his identity with the original defendant. After a hearing upon the proofs taken upon this issue, there had been judgment overruling the exception and reviving the original judgment. Upon this second judgment execution was issued and property about to be sold in satisfaction by Harper, the sheriff. Whereupon *Verneuil* filed a petition for an injunction, and got a rule to show cause why it should not be granted, to stay the sheriff's sale. The petition denied the identity of petitioner with the defendant in the original judgment; that is to say, set up the same defence in the last proceeding which had been made in the second. Feitel filed an exception in the nature of a plea of *res judicata*, which the court *a quo* sustained. The cause went up to the supreme court of Louisiana, which, in the opinion delivered, among other things, said:

"The question [of identity] was litigated at the instance of Verneuil himself; it was solemnly determined against his pretensions; and he took no appeal. * * * We are bound to assume that the decision was right. The presumption in such cases is in favor of the probity of witnesses and the intelligence of the judge. *Res judicata pro veritate accipitur.*"

In the case of *Cox v. Thomas' Adm'x*, 9 Gratt. 323, Thomas had been a sheriff, and there was a motion in the circuit court of his county, by his administratrix, to recover from Cox, his deputy, and the sureties of Cox, the amount of a judgment which had been recovered against the administratrix for money which had been collected by the deputy on an execution issued out of the county court of that county. It appeared from the face of the judgment that the execution upon which the deputy had collected the money had issued from the county court on a judgment of the circuit court, although section 48, 1 Rev. Code of 1819, p. 542, required the creditor to move in the court whence the execution issued, and the record did not show jurisdiction in the circuit court by removal from the county court. The court of appeals held that removal must be presumed from the fact that the circuit court had given judgment. Judge Allen, in rendering the decision of the court of appeals of Virginia, said:

"If the jurisdiction of the circuit court extended over that class of cases, it was the province of the court to determine for itself whether the particular case was one within its jurisdiction. The circuit court is one of general jurisdiction. * * * The jurisdiction of the court to take cognizance of all controversies between individuals in proceedings at law need not (as in cases of limited and restricted jurisdiction) appear on the face of the proceedings. Where its jurisdiction is questioned, it must decide the question itself. Nor is it bound to set forth on the record the facts upon which its jurisdiction depends. Wherever the subject-matter is a controversy at law between individuals, the jurisdiction is presumed from the fact that it has pronounced the judgment; and the correctness of such judgment can be inquired into only by some appellate tribunal."

And then the learned judge, after showing that the circuit court had jurisdiction of the subject-matter involved, went on to say as to the parties:

"The judgment in this case must be considered as conclusive for another reason. Both parties appeared, and the defendant either submitted to the jurisdiction or it was decided against him. In such case, as President Tucker, in *Fisher v. Bassett* 9 Leigh, 119, observed, the question whether the general jurisdiction of the court over matters of that description embraced the particular case, having been decided by its judgment, can never be raised again except by proceedings in error."

If the court of general jurisdiction, in rendering a judgment, has passed expressly upon the jurisdictional facts and found them sufficient, the parties and their privies are estopped in collateral actions to litigate the matter again. *Sheldon v. Wright*, 5 N. Y. 497; *Dyckman v. New York*, Id. 464.

The courts of one state will not allow parties to show that a court of another state has made an erroneous decision upon issues between the same parties raised before and decided by it. *Nurie v. Castrique*, 8 Com. Bench, (N. S.) 405; and S. C. in error, L. R. 4 H. of L. 414. See, also, *Drury's Case*, 8 Coke, 141b; and *Tarlton v. Fisher*, Doug. 671.

These decisions are but examples, among many, to show that where a question, even a question of jurisdiction, has been once litigated between two parties by a court of general jurisdiction, it is to be treated as *res judicata* between the same parties in every other but an appellate forum; and that where, in a litigation between parties in such a court, the question of jurisdiction over parties must have been considered, another court will presume that the court *a quo* did consider it, and treat that question as *res judicata*.

No sound reason can be given why the principle should not apply in a domestic court against parties to a litigation in another sovereignty, before a court of general jurisdiction there. And, although the authorities show that the home court may look into the jurisdiction of the foreign court, both as to parties and subject-matter, yet they also show that the parties to the other litigation are bound by the principle of *res judicata* when they come into the domestic court.

While, therefore, this court is not precluded from looking behind the judgment of the court of Louisiana, and judging for itself of the validity of the process by which the defendant is claimed to have been brought into that court, yet that power of the court, which is established by the weight of the authorities, should not be confounded with the very distinct question, whether the parties to a litigation in a foreign court of general jurisdiction are not bound by its decree, on an issue raised between themselves, whether that issue be on the validity of process there, or on the merits.

Though the principle laid down by Judge Allen does not apply to the prejudice of the power of this court to look behind the Louisiana judgment, it does apply to the plea of the defendant. If the defendant had not appeared by counsel as it did, the simple question here would have been upon the validity of the process that was served there, and of the judgment by default that was rendered there. But, having ap-

peared in a court of general jurisdiction, and formally submitted to that court the question whether Taber was such an agent as that service of citation upon him would bring it into court, and that court having decided against it the issue thus raised by itself, I am bound to consider the defendant estopped by the Louisiana judgment from retrying that question here.

On the whole case, in conclusion, I concur in the view taken of it by plaintiff's counsel in Louisiana, expressed in the language quoted in the brief of plaintiff's counsel here:

"It appears to me that the appearance, called an exception, put at issue the agency of Taber. The plaintiff had broadly averred in her petition that Taber was the agent of the defendant; that her contract was made with Taber as the agent of the defendant; that she paid the premiums to him as agent of the defendant; and that the defendant had ratified and confirmed the contract made by Taber, by accepting and using the premiums paid. These facts alleged by the plaintiff were the material substance of her case; and the paper called an exception was nothing more than an answer and denial of these material facts alleged by the plaintiff. That issue was tried, and proof made, that Taber did make the contract, and no one else did, and the premiums did go to the defendant. It is true that no certificate was shown from the secretary of state, under the statute of 1877; but the defendant is always presumed to have complied with the law, and cannot be heard to say that he violated our laws by taking risks or transacting business so positively forbidden by law, in order to reap a reward or to avoid an obligation based upon his own wrong and turpitude."

The defendant's demurrer to the plaintiff's replication must be overruled.

MOCH and another v. VIRGINIA FIRE & MARINE INS. Co.

(Circuit Court, E. D. Virginia. March 18, 1882.)

BOND, C. J. This cause having been heard in the circuit court, then presided over by the district judge, has been submitted to me, with his consent, as if on motion for a new trial. I have carefully read the elaborate briefs of the parties, and fully concur in the opinion and judgment of the district judge.

GRAVELLE v. MINNEAPOLIS & ST. LOUIS RY. CO.

(Circuit Court, D. Minnesota.)

1. NEGLIGENCE.

Negligence is the failure to exercise that degree of caution which a man of ordinary intelligence would exercise under the circumstances of a particular case.

2. CONTRIBUTORY NEGLIGENCE—ACTION DEFEATED.

In case of personal injuries inflicted by railroad cars in motion, where the plaintiff's negligence contributed to his injuries, he cannot recover.

3. INJURIES THROUGH NEGLIGENCE OF A FELLOW-SERVANT.

A railroad company is not liable for injuries inflicted on a person through the negligence of a fellow-servant of such person. Fellow-servants or co-servants, within this rule, are persons engaged in the same common service under the same general control. Where one servant is invested with control or superiority over another with respect to any particular part of the business, they are not, with respect to such business, fellow-servants within the meaning of the law.

4. EMPLOYER AND EMPLOYEE—CONTRACT—LEGAL IMPLICATIONS.

When a person enters into the service of another he assumes all the ordinary risks incident to the employment, and the employer agrees, by implication of law, not to subject the servant he employs to extraordinary or unusual perils or dangers, and that he will furnish the employee with reasonably safe and convenient machinery with which to perform his duties.

5. RAILROAD COMPANIES—PRESUMPTIONS AS TO EMPLOYEES AND MACHINERY.

The law presumes that railroad companies employ for their service persons of reasonable competency and fitness for their duties; and this presumption exists till the company is notified of their incompetency and unfitness. The same rule substantially applies to the question of the sufficiency of the machinery employed.

At Law.

Action for damages for personal injuries sustained by an employee through alleged negligence of a railroad company. Pending on motion for new trial.

C. K. Davis and *A. B. Jackson*, for plaintiff.

J. D. Springer, for defendant.

McCRARY, C. J., (*charging jury*.) The case which you are now called upon to consider, so far as the facts are concerned, is one in which Mr. Jeremiah Gravelle, the plaintiff, alleges that he has been injured in his person by the negligence of the defendant. You will see at a glance that the main question is a question of negligence, and that question you are to consider in the light of what I shall say to you concerning the law.

The plaintiff claims that he was employed as a laborer in the yards of the defendant, the Minneapolis & St. Louis Railway Company, at

Minneapolis; that while in their employment (I think it was some time in November, 1879) he was ordered by the assistant yard-master of the company (Mr. McCummings, I think, is the name) to make a coupling between an engine and tender and a certain freight car standing upon one of the tracks in that yard. He claims that, under the circumstances of the case, this was a duty which was extraordinarily and unusually dangerous and hazardous, and that on account of the negligence of the assistant yard-master, Mr. Cummings, in ordering him to make the coupling under the circumstances, and in failing to give an order or signal to check the speed of the approaching engine, he was injured without any fault or negligence on his own part. He also claims that the assistant yard-master, and the engineer who was in charge of the engine and tender, were negligent, unskillful, and unfit persons for their places, and that the defendant, the railroad company, had knowledge of the fact. He also claims that the machinery was not in proper condition, because the tender which he was required to couple to the freight car had no coupling link upon it. These are the facts upon which the plaintiff relies, which he claims to have established before you.

On the part of the defendant it is claimed, in the first place, that their agents were not negligent; that the engine and tender were approaching the freight car at about the usual rate of speed, and not at an extraordinary or dangerous rate; that the duty which the plaintiff undertook to perform in that case was not unusually hazardous or dangerous; and that there was no negligence on the part of the assistant yard-master in ordering him to do the duty under the circumstances, nor on the part of the engineer in running the engine up to the freight car. Defendant further claims that if there was negligence on the part of any of its individual agents, it was negligence of a fellow-servant employed in the same common service with the plaintiff, and that, therefore, the plaintiff cannot recover; the law being that the employer, the railroad company, is not liable, is not responsible, for injuries which one of its servants may receive on account of the negligence of another fellow-servant employed in the same common service with the party injured.

As to the defect in the machinery by reason of the absence of the link from the tender, the defendant claims that that was not a defect; that it was not unusual to use tenders that had no links attached to them; that it was common to leave them inside the tender or lying upon the track to be picked up and used as occasion may require.

These are the issues upon which you have heard the testimony. It

is your duty to consider it impartially and carefully, and to reach your conclusion upon the questions of fact and find a verdict, in the sight of the law as I shall now endeavor to explain it.

As I have already said, the controlling question is a question of negligence. But I should have said to you, however, that another defence of the defendant is that the plaintiff himself was guilty of negligence which contributed to his injury. Negligence is the failure to exercise that degree of caution which a man of ordinary intelligence would exercise under the circumstances of a particular case. The degree of care which is required of a man is measured by the circumstances by which he is surrounded, by the nature of the duties in the performance of which he is engaged. What would be ordinary care and prudence under one set of circumstances, might be negligence under another set of circumstances. As, for example, if a person is traveling along the public highway, with his vehicle, at an ordinary rate of speed, and no unusual circumstances to excite caution or induce care, in that case a very slight degree of care may be considered sufficient; while, on the other hand, if he is engaged in coupling cars upon a railroad, where there are a great number of cars and engines, the very nature of his employment requires greater care and attention than would be required under other circumstances.

Your first inquiry, then, may be as to whether the plaintiff was guilty of any negligence or any want of ordinary care and prudence on the occasion of the accident. If you find that he was guilty of negligence which contributed to his injury, the law is that he cannot recover, and you will not be required to go any further with your investigations. But if you find him not guilty of contributory negligence you will then proceed to consider the other points.

You must find that the accident and injury were the result, not of the negligence of a fellow-servant engaged in the same common service with the plaintiff. And it is necessary for me to explain to you what is meant by the rule which I have stated. A fellow-servant or co-servant, within the meaning of this rule, is a person engaged in the same common service under the same general control of the party injured. I believe it is not contended in this case that there is any question but that the engineer upon the engine that was attached to the tender and the plaintiff were fellow-servants; so that the question, if you come to it, will be a question as to whether the accident was caused by the negligence of the assistant yard-master; for it is claimed that he was not a fellow-servant within the meaning of the rule which I have given you. But I will come to that presently.

After you have considered the question of contributory negligence, you will then inquire whether the braking (coupling?) was done under the direction of the assistant yard-master, and in his presence, so that it was his duty to regulate the movements of the approaching engine. And here there is some conflict in the testimony, and a question of fact for you to decide.

It is claimed by the plaintiff that the assistant yard-master, Mr. McCummings, was present and gave the order to do the coupling, and was there as the engine and tender approached the car, so that if it was coming at a rate of speed dangerously rapid he must have seen it, and it was his duty to have given a signal to check or slacken the speed. On the part of the defendant the claim is that Mr. McCummings gave a general order to the crew, of which the plaintiff was one, to make the coupling; that having given it he walked down the track and went off about his business in some other part of the yard, and that he was not present at the time the engine came down to be attached, so that he was not directing the coupling, and that it was not his duty under such circumstances to notice the rate of speed at which the engine was approaching, or give a signal to check the engine if it was approaching too fast.

Of course you will inquire whether the engine and tender did approach at an unusual rate of speed. If you find that it did not; that it came up at a usual rate of speed; and that everything was done in the usual way,—then there was no extraordinary peril, and no negligence on the part of the assistant yard-master, and no negligence on the part of the defendant, unless you find negligence on account of the absence of the link. But we will come to that afterwards. But if you find that there was negligence in the manner in which the engine and tender were brought up to be coupled onto the freight car, then you will consider this question: as to whether Mr. McCummings was there present, and giving directions as to the manner of coupling, so that it was his duty to see what was going on, and give directions to check the speed of the approaching engine. If you find that he was there, and giving directions, and that his attention was directed, or ought to have been directed, to the approaching engine, and that he failed to give the proper direction to check its speed, and if you find that it was negligence on his part which resulted in injury to the plaintiff without any fault on the part of the plaintiff, then you will come to this question which I have stated to you: whether Mr. McCummings, the assistant yard-master, was within this rule which I stated,—that is, whether he was a fellow-servant engaged in the

same common service with the plaintiff, or whether he was there on the part of the company. And you may be governed by the following rule: "Fellow-servants, within the meaning of the law, are such as are employed in the same service, and subject to the same general contract. But if a railroad company sees fit to invest one of its servants with control or superior authority over another with respect to any particular part of his business, the two are not, with respect to such business, fellow-servants within the meaning of the law. One is, in such a case, subordinate to the other, and the superior stands in place of the corporation." So, if you find, in your investigations, that the plaintiff was injured by the negligence of its assistant yard-master, then you will inquire whether the plaintiff was a subordinate with respect to the duties which he was then performing,—if he was under the control and direction of the assistant yard-master, by the rules of the railroad company, in the performance of the duty which he was then performing. If so, I charge you as a matter of law that they were not fellow-servants within the meaning of the rule.

Now there is another question in the case upon which there is, perhaps, some conflict of testimony. It is alleged by the plaintiff that these two officials, the assistant yard-master and the engineer in charge of the engine and tender, were both negligent, incompetent, and unfit persons for the positions which they held, and that this was known to the defendant; and that it was guilty of negligence in employing them, or continuing to employ them; whereby the plaintiff has a right to complain that he was injured on account of that negligence. Upon that subject the law is that when the plaintiff entered the service of the railroad company he assumed all the ordinary risks incident to the employment upon which he entered. He knew that he was entering upon a dangerous business, and therefore assumed all the risks ordinarily incident to the performance of the duties that he undertook to perform. On the other hand, the railroad company agreed, by the implication of the law, that they would not subject him to extraordinary or unusual perils or dangers; and, among other things, they agreed that they would employ for service with him persons of reasonable competency and fitness for their duties, and he had a right to expect that. The law presumes, however, that the railroad company, in employing its servants, exercised usual care and prudence, and if the plaintiff seeks to recover on the ground that it failed in that respect, it is incumbent upon him to prove this: In the first place, that these servants were incompetent and unfit persons; and, in the second place, that the railroad company had notice

of that, either when it employed them, or at some time before the happening of this injury to the plaintiff. If there is no proof before you that the railroad company had any such notice; if at the time of employing these persons they had no reason to believe that they were incompetent,—then the plaintiff cannot recover upon the ground that these parties complained of were known to be incompetent and unfit persons.

The same rule substantially applies to the question of the sufficiency of the machinery. The railroad company agrees, when they employ a man to work for them, that they will furnish him with reasonably safe and convenient implements and machinery with which to perform his duties. If they fail in this, and the employe is injured on that account, and without fault of his own, they are liable. As I have said before, the only question here with regard to the machinery is whether the absence of the link from the tender is such a defect in the machinery as the plaintiff had no reason to apprehend; whether it was an unusual thing, and in consequence of it the plaintiff was subjected to extraordinary dangers and perils. If you find that it was not unusual to have the links left off the tender, then the plaintiff, of course, was bound to be advised of that fact, and cannot recover upon that ground. But if you find that it was the duty of the railroad company always to have the link on the tender, and that the failure to do that was to leave the machinery in an unusually dangerous condition, the fact would give the plaintiff the right to recover.

At the request of the defendant's counsel I instruct you to find specially upon the following questions:

(1) Was the assistant yard-master a competent person for that position when employed and put to work by the defendant as such assistant yard-master? (2) At the time of the injury in question was the assistant yard-master an unsuitable and incompetent person for that position, to the knowledge of the defendant? (3) When employed and put in charge of the engine in question, was the engineer, Mr. Dean, a competent person for that position? (4) At the time of the injury in question was the engineer in charge of the engine in question an incompetent and unsuitable person for that position, to the knowledge of the defendant?

If you find for the plaintiff, you will come to the question of damages. This is a question very largely in your discretion, limited only by the duty which devolves upon you not to find excessive or unreasonable damages. You will, if you come to this question, have to consider the nature and extent and permanency of the plaintiff's in-

juries; his ability to earn a living since the receiving of the injury in question as compared with his ability before that time; his pain and suffering, both mental and physical. There is no testimony as to any expenses for surgeon's services here, and therefore you will not take them into consideration; but, upon all the testimony before you, if you find for the plaintiff, you will find in such a sum as you shall think reasonable and proper.

Then followed directions as to the forms of the verdict and special findings, and request to the jury to canvass one another's views thoroughly.

YOUNG and others v. DUNN and others.*

(Circuit Court, E. D. Texas. February, 1882.)

1. TITLE—EJECTMENT.

In cases of ejectment plaintiff must recover on the strength of his own title, and that title must be a legal one. An equitable title will not suffice to maintain ejectment in this court, though it may in the courts of the state under the proceedings authorized by the state statutes.

Sheirburn v. De Cordova, 24 How. 423.

2. PARTNERSHIP IN LANDS.

The holder by conveyance or bequest of one partner's share in the lands of a partnership cannot maintain ejectment for it; his remedy is in equity.

Clagett v. Kilburne, 1 Black, 246.

3. ESTOPPEL.

The declaration of a stranger cannot operate as an estoppel upon the defendant.

Lyle & Thomas, for plaintiffs.

Mr. Walton, for defendant Dunn.

PARDEE, C. J. Plaintiffs, as devisees by last will and testament of S. C. Colville, bring this suit against Mary H. Dunn and the Houston & Texas Central Railroad Company to recover the undivided half of certain 320 acres near Dennison, in this state. Defendant Mary H. Dunn has pleaded not guilty, but the railroad company does not appear to have pleaded at all, though counsel assents that a general denial has been entered for the company. But of this hereafter. Defendant Dunn has also pleaded adverse possession, and the statute of limitations of three, five, and ten years, and has also entered claim for improvements. Plaintiff and defendant Dunn have filed a stipulation waiving a jury, and the case has been tried by the

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

court. Plaintiff proves a patent from the republic of Texas of date December 2, 1841, of the entire tract to James A. Caldwell. He proves next a letter which has been probated as a will of James A. Caldwell, of date March 21, 1842, which is in these words:

"Mr. S. C. COLVILLE: The business that we have been doing never having been committed to writing, knowing, as we do, the uncertainty of life, I give you this statement of our verbal understanding: *First*, all the land that is connected at Shawneetown which may be owned by either, or in the name of any other, is now the property of both as company stock. Also all the claims that is in your hands that is not located is also joint stock. Also all the animal stock is the same that is at Shawneetown. All property that is known to belong to yourself and myself at that place is joint stock, (except a negro girl, Louisa, to which I have no claim.) Also all the money that we may have there, or any debts that you or I may have in our trading since you went to that place. And, further, as I have had trading in Austin, Travis county, it will also be understood that all my trading there was on the same principle; all the lands that I may have, or town lots, or outlots, or houses and lots, or any negroes that may be in my name, or chattels or any interest that I may have in the trading house of Edington, them and each of them is joint stock betwixt yourself and myself. Now, as life is uncertain, I want you, in case of accident, to be my agent in fact and entire; I want you to have the free use of all my share of this property in case of my death for your natural life-time, and at your death it to go to the offspring of my only blood relation, now in Texas; that is, Jane McFarland, the wife of Jacob McFarland. These, with other requests that you know, I leave with you, hoping that you will not have this melancholy duty to perform, and that again we will meet and exchange the hopes for long life and friendship.

"Yours in friendship,

[Signed]

J. A. CALDWELL.

"S. C. Colville."

Plaintiff next offers last will and testament, duly probated, of S. C. Colville to plaintiffs, and then certain depositions showing insanity, infancy, and coverture of the various plaintiffs, running back and covering many years. The defendant proves possession for 20 odd years and improvements.

The difficult question for plaintiffs arises under that so-called will of Caldwell, which is a necessary link in the plaintiffs' chain of title. There seems to be no question that in cases like this of ejectment the plaintiff must recover on the strength of his own title. Nor can there be any doubt that that title must be a legal title.

An equitable title will not suffice to maintain ejectment in this court, though it may in the courts of the state under the proceedings authorized by the state statutes. See *Sheirburn v. De Cordova*, 24 How. 423.

The letter given in full herein has been duly probated as Caldwell's will; and the question is whether that letter, as the will of Caldwell, conveys the legal title of the lands in controversy to Colville. Counsel claim that the intention to convey is apparent, and that the rule is that the intention must govern if not contrary to law.

I concede the law, but I do not find in the will any intention expressed by Caldwell, in technical or untechnical language, to convey or bequeath anything but his own share of certain company or partnership property, and that share is bequeathed to Colville for life, remainder to Mrs. McFarland. There is no general bequest or universal legacy in the instrument. The balance of the will is merely the declaration of a trust in the testator and in Colville, of company property, and does not imply or express any desire or intention to convey or bequeath such company property to any person whatever. But giving it the effect of a conveyance or bequest, then it is in its broadest sense a conveyance or bequest to the partnership, and Colville, as a partner, took only an equitable title. For a case in direct point see *Clagett v. Kilburne*, 1 Black, 346. The whole letter was, probably, only designed by the writer to furnish Colville evidence of the partnership, and the extent of the partnership property; at least, that is a fair inference from the total absence of all the words usual even among the most ignorant when attempting to make a will, and Caldwell was not an ignorant man.

The case would be stronger if plaintiffs were suing for Caldwell's half of the tract; for the life estate of that is, perhaps, conveyed by the letter or will to Colville.

Counsel claim that if the will does not make a legal title for plaintiffs, then, as it declares ownership in Colville of the undivided half of the tract in question, that it in some way operates so that plaintiffs can maintain legal title by estoppel.

I cannot see how the defendant is estopped by the declaration of a stranger. The defendant does not claim or prove any title under either Caldwell or Colville, or anybody else. But if she is estopped, that does not help us out of the difficulty, which is that the plaintiff must recover, if at all, on a legal title sufficiently proved.

As to the railroad company, either an answer has been filed, in which case no judgment by default can be rendered, nor any other judgment for plaintiffs, as they have failed to prove title; or no answer has been filed, and the company is in default, in which case I can render no judgment against the company, as there is no waiver of jury on its behalf.

I find no answer in the record for the company, but counsel for Dunn says, in his brief submitted, that one has been filed at some time in the case by Hancock & West, attorneys for the railroad company; but, as shown above, it is immaterial for this decision. Let a judgment and a finding of "not guilty" be entered in favor of defendant Dunn, with costs.

RUNDEL v. LIFE ASS'N OF AMERICA.*

(Circuit Court, E. D. Louisiana. February 23, 1882.)

1. CORPORATIONS—LIQUIDATION.

Creditors of a corporation, who are at the same time members of it, as such members have assented to the laws of the state of its creation, which control the settlement of its affairs, upon its being dissolved; *i. e.*, they have assented that the officers by whom, and the place and manner, shall be such as the laws of that state provide. The effect of this contract and assent makes the territorial extent of the authority of the person charged with the liquidation co-extensive with the authority of an assignee in bankruptcy, or a receiver of a national bank, springing from the territorial effect of a national law.

G. L. Hall, A. Goldthwaite, and W. S. Relf, for Superintendent of Insurance.

Gus. A. Breaux, Harry H. Hall, and Herman B. Magruder, for Louisiana creditors.

BILLINGS, D. J. The defendant was a mutual life insurance corporation, created and domiciled in the state of Missouri, but having agencies and transacting large business under its charter in this state and other states. It has a large fund in this state now in the hands of the receiver in this cause. The defendant Williams is a statutory officer of the state of Missouri, who, according to the charter of the corporation, upon its dissolution had vested in him all its property, and is charged with the duty of winding up its affairs. *Relfe v. Rundle*, 103 U. S. 222. The operation of this statute of Missouri, under the ruling of the supreme court, is that each policy-holder—no matter where he resides—signing the constitution of the corporation, thereby assents to all of the provisions of the statutes of the state where the corporation is created, including that which vests all its property in the superintendent, and gives him authority to wind

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

up its affairs. The corporation has been dissolved, and defendant Williams is in possession of its assets in Missouri under a decree rendered in a cause which was commenced prior to this cause.

The contention is on the part of the complainants that as to the funds in the hands of the receiver the Louisiana creditors have a preference for payment, or at least the right to have them retained here in the hands of the receiver as security that the amount due them will be paid. The claim on the part of the superintendent is that, under the law creating the corporation, the affairs, and the whole of them, should, upon its dissolution, pass into his hands as an officer of the state of Missouri.

The Louisiana creditors are such only by virtue of being policy-holders, and the company is a mutual one. They are, therefore, stock-holders, liable to become debtors in case there should be a deficiency of total assets over the debts, and capable of becoming creditors in case there should be an excess. As matter of fact, in this case, they will be creditors. But they are creditors only by virtue of being members of the corporation. It must be that as members of a corporation they have assented to the laws of the state of its creation, which, upon its being dissolved, control the settlement of its affairs; *i. e.*, they have assented that the officers by whom, and the place and manner, shall be such as the laws of the state of Missouri prescribe.

There must be a common method by which the amount due by or to each policy-holder shall be ascertained, and this must be done by a common representative. This is the contract to which the plaintiffs bound themselves when they subjected themselves to the operation of the organic law of the corporation by becoming members of it. They cannot, therefore, now ask the court to protect them in the exercise of a right which they expressly relinquished. The effect which is wrought by this contract and assent to the laws of the state of Missouri makes the territorial extent of the authority of the superintendent to administer co-extensive with the authority of an assignee in bankruptcy, or a receiver of a national bank, springing from the territorial effect of a national law.

The decree must, therefore, be for the defendant Williams, as superintendent, directing the receiver, Fell, to turn over to him all the property of the corporation to be administered under the laws of the state of Missouri, and remitting the complainants to the court which decreed the dissolution. By reason of the consent which has been given in this cause, it must provide that before this is done all the

expenses of the administration up to this time, including the compensation of the receiver, Fell, and the costs in this cause, be paid by the defendant Williams, as trustee.

CASE, Receiver, v. SMALL and others.*

(Circuit Court, E. D. Louisiana. July 14, 1881.)

1. NATIONAL BANK—COMPTROLLER OF THE CURRENCY—REV. ST. § 5234.

The comptroller of the currency has no power to compound or settle claims of a national bank against its debtors; that requires the authority of the court, under Rev. St. § 5234. *Quære*, can he direct their discontinuance?

2. NATIONAL BANK—LIABILITY OF STOCKHOLDERS—REV. ST. 5151.

Under section 5151, Rev. St., owners of stock in a national bank are liable for its debts, and persons who hold themselves out or allow themselves to be held out as owners of stock, are also liable, whether they own stock or not.

John D. Rouse and William Grant, for complainant.

Thomas J. Semmes and Robert Mott, for defendant I. K. Small.

PARDEE, C. J. This is a suit brought by the receiver of the Crescent City National Bank against the defendants to compel the contribution of 70 per cent. on certain 50 shares of the stock of said bank, under the assessment of the comptroller of the currency, by virtue of section 5151, Rev. St.

It seems that, just prior to the failure of the bank, Keenan, one of the defendants, through a broker, sold 50 shares of the stock. They were purchased by I. K. Small, and paid for by him, as he says, for and on account of his sister, Miss E. M. Small, and were transferred on the books of the bank by Keenan to Miss Small.

The plaintiff claims that this transfer, so far as the putting of the stock in the name of Miss Small is concerned, was a sham, a simulation, and that I. K. Small was the real purchaser; that this simulation was resorted to to avoid the liability of stockholders under the laws of the United States.

It is shown that Miss Small resides in Maine; that she was spending the winter here, and was and is of no pecuniary responsibility, and was without means of her own to make the purchase, requiring \$1,500; that I. K. Small paid the purchase price, and, so far as it appears, has never been reimbursed. An examination of the evidence of I. K. Small, taken in a former case, in relation to the same

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stock, and of his answers filed in this case, leave no other conclusion in my mind than that the interposition of Miss Small was a sham, and that I. K. Small was the real purchaser and owner of the stock. In his first examination his answers were evasive, when if the facts had been in his favor they could, and undoubtedly would, have been clear and responsive. Here is a sample:

Question. Has she (your sister) ever reimbursed you for the payment on this stock that you made? *Answer.* Not entirely. No, sir. *Q.* Has she reimbursed you any part of the payment? *A.* Yes, sir. *Q.* How much? *A.* Well, I don't remember that. *Q.* When did she make any such reimbursement? *A.* I think it was in 1874, she gave me something. *Q.* How much? *A.* It was not very much; it was a small amount. *Q.* Was it ten dollars? *A.* More than that. *Q.* Tell us, as near as you can. *A.* Thirty dollars or forty dollars. *Q.* In what manner did she make such reimbursement to you? *A.* In presents.

Again:

Question. Now is it not the fact that you bought that stock for yourself, and put it in your sister's name in order to avoid some liability? *Answer.* I bought the stock at that time with her knowledge and consent, and told her of it at the time I bought it. *Q.* Suppose that the bank had not failed, would you have transferred that stock to her, and given her the ownership of it, or would you have considered it as belonging to yourself? *A.* The stock was never transferred at all; it was taken from the broker and given to her; it was never transferred to my knowledge. *Q.* Did you not buy that stock for your own account, and with the intention of speculating in it for your own benefit? *A.* I told the broker at the time that I bought that stock to put it in the name of E. M. Small. Last question repeated. *A.* It is possible I may have enjoyed some benefit from that stock.

In the answer filed to the interrogatories in this case defendant Small is not so evasive, but he is by no means as candid as he might have been if the actual facts would have warranted. And now, in his answer, he admits to an ownership of one-seventh, which was in nowise hinted at in the first evidence.

In defence it is first urged that the transaction was *bona fide*, and that Miss Small was the real purchaser and owner of the stock. The facts are against this defence.

Next, that I. K. Small, knowing that the bank was in failing circumstances, had a right to donate the money to his sister, and with it purchase the stock and put it in her name.

This is a doubtful proposition, but conceding it, for this case, the facts will not bear out this defence. In the evidence given by Small, above quoted; the purchase was for account of his sister, and she had reimbursed him in part of the purchase price; and, besides, no such

defence is pleaded. Then it is urged, as well as pleaded, that the letter of recent date from the comptroller of the currency to Robert Mott, Esq., stating that a final dividend to the creditors of the Crescent City National Bank had been declared, and was now payable on signing receipt and returning certificate of indebtedness, operated in abatement of this suit. I find no authority for this position. The statutes give the comptroller no such authority to so inferentially stop suits. Perhaps he might direct the receiver to discontinue, but to compound and settle claims requires the authority of the court. Rev. St. § 5234. To discontinue the direction should be positive.

And, finally, it is argued that under section 5151, Rev. St., no person can be made liable unless at some time or other he has been a stockholder of record, and been held out to the world as such. The law seems to be settled now that the owners of stock are liable under that section.

At the same time, those persons who hold themselves or allow themselves to be held out as owners of stock, are liable whether they own stock or not. It would seem that the rules relating to the ownership of national bank stock are about the same as apply to partnerships. Real partners are liable though not publicly known as partners, and persons who allow themselves to be held out as partners are liable though they have no real interest.

The case of *Davis v. Stevens*, decided by Chief Justice Waite, 17 Blatchf. 259, is a case directly in point. See, also, *National Bank v. Case*, 99 U. S. 628.

Let the accompanying decree for complainant be entered:

DECREE.

This cause came on to be tried at this term as to the defendant I. K. Small, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:

That said defendant I. K. Small was, at the time of the failure of the Crescent City National Bank, on the fourteenth day of March, 1873, the owner of 50 shares of the capital stock of said bank, of the par value of \$100 each, then registered and standing on the books of said bank in the name of E. M. Small. And it is further ordered and decreed that said Frank F. Case, in his capacity as receiver of said Crescent City National Bank of New Orleans, do have and recover from the defendant I. K. Small, as owner of said shares, 70 per centum of the par value thereof, to-wit, the sum of \$3,500. And it is further ordered, adjudged, and decreed that said defendant pay the

costs of this suit to be taxed. And it is further ordered, adjudged, and decreed that complainant have execution against said defendant to enforce the payment of the sum so decreed to be paid and costs.

NOTE. A receiver, appointed under the provisions of this act, may compromise doubtful debts "on the order of a court of record of competent jurisdiction." *In re Platt*, 1 Ben. 534; and see, generally, *Kennedy v. Gibson*, 8 Wall. 498; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383; *Bank v. Kennedy*, 16 Wall. 19; *Chemical Nat. Bank v. Bailey*, 12 Blatchf. 480; *Cadle v. Baker*, 20 Wall. 650; *Harvey v. Lord*, 10 FED. REP. 236; *Fifth Nat. Bank v. Pittsburgh & C. S. R. Co.* 1 FED. REP. 190. The liability of stockholders of a national bank for its debts is several and not joint. *Nat. Bank v. Knox*, 2 Morr. Trans. 248. It is that of principals, not of sureties. *Hobart v. Johnson*, 6 FED. REP. 493.—[ED.]

McKAY v. IRVINE.

(Circuit Court, N. D. Illinois. February 22, 1882.)

1. HORSE-RACING—NEGLIGENCE—FOUL RIDING—LIABILITY OF OWNER.

The owner of a horse entered for a race takes all the risks incident to the race: and if a horse is intentionally fouled, or purposely runs against or interferes with a competing horse in the race by the rider, the employer of such rider is liable for damages for any injury which results.

2. SAME—FOUL RIDING, WHAT IS—RIDERS—RULE OF DUTY.

If a jockey attempts to take the track ahead of another horse before his horse is a clear length ahead of the other horse, or if he crowds the other horse, so as to impede him, or compels his jockey to hold him in, or change his course to avoid a collision, it would be foul riding; and the fact that the rider who attempts a foul runs as great risk to himself and his horse as he imposes on his competitor, will not justify him in attempting a foul.

3. TRIAL—CONFLICT OF EVIDENCE—PROVINCE OF JURY.

In case of a conflict of evidence the credence to be given to the testimony of a witness is for the jury to determine.

4. MEASURE OF DAMAGES.

In an action for damages for the death of a horse, caused by the collision of a competing horse in a horse-race, the damages must be estimated at what is shown by the evidence to have been the value of the horse killed.

M. O. Lewis and W. I. Culver, for plaintiff.

S. K. Dow, for defendant.

BLDGGETT, D. J., (*charging jury*.) Gentlemen of the jury, this is a suit for damages alleged to have been sustained by the plaintiff from the wilful or negligent act of the defendant's servant. The plaintiff claims that on the twenty-fifth of June last he was the owner of the thoroughbred stallion known as "Wolverton;" that this horse was

entered for a race that day at the Chicago Driving Park, near this city, competing with eight other horses for a purse offered by the Driving Park Association; and that the defendant was also the owner of a mare called the "Belle of Nelson," entered in the same race; that in the second heat of this race the defendant's mare, ridden by his servant or employe, was, by intention or negligence of the jockey or rider for the defendant, foully ridden against the plaintiff's horse, whereby the latter was thrown and killed.

The defendant denies that his mare was either intentionally or negligently ridden against the plaintiff's horse, and denies that the death of the plaintiff's horse was caused by any act of his jockey or rider.

If you have no knowledge of horse-racing, other than that developed by the proof in this case, you must see that in a race like this a horse is necessarily exposed to great hazard and peril. In the first place the horses are mostly ridden by boys, who can do little in the way of guiding or controlling them, and whose chief office would seem to be to urge them with whip and spur to the top of their speed; and in the second place the horses themselves are high-strung, nervous, and excitable, and with so many competitors as there were in this race, on a comparatively narrow track, not running in a straight line, but around a parallelogram with curved or rounded corners, so that at least four turns must be made, there must be great risk of collision, especially at these turns, even when the horses are fairly and carefully ridden; and those risks the owner of a horse, starting in a race, must be presumed to take,—that is, he takes all the risks of accident incident to the race. But if a horse is intentionally fouled,—if it is purposely run against or interfered with by the rider of another horse,—the employer of the rider who so fouls him or interferes with him is liable for damages; and, so too, each rider is bound, as far as possible, to keep his horse from fouling with another, and his employer would be liable for any palpable or clear act of negligence, whereby a foul was occasioned; but I can hardly imagine a case where there would be liability for negligence except where the rider was incompetent. The owner starting his horse in a race is bound to have a rider who is competent, to such an extent as is necessary, to sufficiently manage and control the horse for the purposes of the race, and the owner who starts his horse in a race with a rider incompetent to perform the duties of so guiding and controlling the horse, might be held liable for the consequences of his rider's incompetency. This question, however, does not arise in this case, as

there is no charge that the defendant's jockey was not competent for the service and duty assigned to him.

The foul complained of in this case is charged to have consisted in an attempt on the part of the rider of the Belle of Nelson to take the track ahead of Wolverton before his mare was far enough ahead of Wolverton to enable her to draw in front of him without collision. You can readily see if a jockey attempts to take the track ahead of another horse before his horse is a clear length ahead of the other he runs great risk of colliding with the other horse; and if he does so collide, or if he crowds the other horse so as to impede him or compel his jockey to hold him in or change his course for the purpose of avoiding a collision, it would be unfair, and therefore would be foul riding; but there may be a case where there is a clear space between the horses sufficient to justify the foremost one in attempting to take the track, and yet at the moment the jockey of the foremost horse attempts the maneuver the rear horse may be pushed or rushed suddenly up, in which event a collision may occur by the act of the rider of the rear horse.

You will also bear in mind that so far as danger is concerned the rider who attempts a foul runs as great risk to himself and his own horse as he imposes on his competitor, because it is impossible to tell in advance who may be the sufferer. But this fact does not justify a jockey in attempting a foul on the ground that he risks as much as his competitor.

So much as to the rule of duty and obligation which each rider and the employer of the rider assumes in a race like this, and is bound to observe towards his competitor.

The plaintiff has given proof tending to show that his horse had the second position in the second heat—that is, that he was started under the wire next to the horse that had the pole, and that he maintained that position and was a little behind Nero, who had the pole, and that the Belle of Nelson was a little ahead of the plaintiff's horse up to and at the first turn, which was from 150 to 200 yards from the wire; that at this point the Belle of Nelson was reined in to the left onto the plaintiff's horse, and, in attempting to pass ahead of him, tripped him, and he fell and was fatally injured. The testimony on the part of the plaintiff tends to show this state of facts. This testimony comes from persons who were spectators of the race, and who, from different positions or stand-points of observation, saw, or think they saw, the movements of each horse, and saw acts on the

part of defendant's rider which, if true, would show an intentional fouling of plaintiff's horse.

The defendant has given proof tending to show that his mare was in the lead well ahead of Wolverton when he fell, and that his fall was occasioned either by collision with some other horse, or by his stumbling, or some other inherent weakness. The proof on the part of defendant tends to show that immediately after leaving the wire the Belle of Nelson and the horse Clan Alpine rushed to the front; that they became the leading horses in the race and were clear ahead, a length or more, of Nero and Wolverton at the first turn, and at the time when Wolverton fell, so that a collision between Wolverton and the Belle of Nelson, according to the testimony of the plaintiff's witnesses, was impossible; the defendant's proof, as I have said, tending to show that the Belle of Nelson and Clan Alpine took the lead within a few jumps after leaving the wire, and that she could not have collided with Wolverton at the turn, as she had been ahead of him for quite a distance before they reached the turn. The defendant has also given proof tending to show that plaintiff's horse was badly ridden; that his rider was incompetent and did not understand the proper management of his horse, and that the horse was out of condition; that he had stumbled in his exercises before the race, and was in such condition as to be liable to fall upon being pushed to his utmost in the second heat of a contest like this

You will see, therefore, that there is a conflict of testimony here, which you must settle, as to whether this injury was occasioned by the fault of defendant's jockey.

It is for you to say which one of these witnesses you will believe, or where you will place credence; not that you must necessarily conclude that either of these witnesses have sworn falsely, because you must see from the manner in which these witnesses have testified that it was very difficult to judge just exactly, at the critical moment when this horse fell, what horse was next to him, or what horse caused him to fall, or what did actually cause him to fall.

The whole matter seems to have occurred instantaneously, and witnesses of equal intelligence and equal credibility have given you different versions of the way in which this accident occurred, and the manner in which the horse fell, and what horse was nearest to him. Some say the Belle of Nelson was ahead; some say she was clear ahead of him—more than a length; and others say she was running with Wolverton's nose about at her saddle-girth, when her rider pulled her in ahead of him and thereby tripped him up.

These witnesses testify from various positions. You must determine from the intelligence of the witnesses, from their apparent candor and fairness, and from their opportunities of observation, where the truth lies in this case.

The plaintiff has the burden of proof. He is bound to satisfy you by a preponderance of testimony that the accident in this case was occasioned by the fault of the defendant's jockey. If you cannot say, from the testimony in the case when it is all considered together, that it was the fault of this defendant's jockey, then the defendant is not liable. The plaintiff is bound to satisfy you, not only that his horse fell, but that it was caused by this defendant's act or the act of his jockey, and that it was a wilful or intentional act on the part of the jockey, or so grossly negligent as to amount to incompetency on his part. If the proof does not satisfy you that this horse was killed by the act of the defendant's jockey, or by the gross incompetency and negligence of the defendant's jockey; or if you find from the proof that the death of plaintiff's horse was caused by his being out of condition, or his stumbling, or the negligence or incompetency of plaintiff's jockey,—then the defendant will be entitled to a verdict at your hands; but if you find from the proof that the horse was killed, as charged, by the foul riding of the defendant's jockey, then it will be your duty to find a verdict for the plaintiff, and, in case you do, it will also be your duty to fix the damages which the plaintiff has sustained by the loss of his horse; and in doing so the damages must be estimated at what is shown by the proof to have been the value of the horse. The proof tends to show that this was a thoroughbred horse, bred in England and imported into this country only a few weeks prior to this race. The plaintiff alleges that the pedigree of his horse shows a high degree of excellence of blood, but the pedigree is not before you; there is, however, testimony of not only the plaintiff himself, but of experts who saw the horse and who claim, from experience, to be able to judge whether a horse is or is not thoroughbred, that he was a thoroughbred horse.

From the testimony in the case you are to say, if you find the defendant guilty, what was the value of the horse; because the measure of plaintiff's damages is the value of the horse, it being conceded that the loss was total.

UNITED STATES *v.* BUNTIN.*

(Circuit Court, S. D. Ohio, W. D. February, 1882.)

1. CRIMES—DEPRIVATION OF CIVIL RIGHTS—COLORED SCHOOL CHILDREN—REQUISITES TO CONVICTION—REV. ST. § 5510.

In a prosecution under section 5510, Rev. St., for depriving a colored child of the right to attend public school, *held* that, to warrant conviction, the defendant must have excluded such child under color of a law, statute, ordinance, regulation, or custom of a state, and on account of his color.

2. SAME—CIVIL ACTION NOT A BAR TO CRIMINAL PROSECUTION.

Held, also, that the institution of a civil action and recovery of damages for the deprivation of the right charged in the indictment, is not a bar to a criminal prosecution therefor.

3. SAME—ADMISSION OF OFFENCE—GOOD CHARACTER IMMATERIAL.

Where the defendant admits the essential elements of the crime alleged, except, that the prosecuting witness possessed the right which the defendant is charged with violating,—*i. e.*, in this case, where he admits the exclusion of the child; that he excluded him under color of a statute of the state, and because of his color,—evidence of defendant's good character is immaterial, and entitled to no consideration by the jury.

4. SAME—ACTING IN GOOD FAITH UNDER ADVICE OF COUNSEL NO DEFENCE—MITIGATION.

That the defendant in good faith consulted counsel, and was advised by them that he was authorized to do that with which he is charged, and acted on such advice, is no defence to the indictment, although such evidence would address itself strongly to the discretion of the court after conviction in mitigation of punishment.

5. CIVIL RIGHTS—SEPARATE SCHOOLS FOR COLORED CHILDREN.

Separate schools may be provided for colored children, but they must be reasonably accessible, and must afford substantially equal educational advantages with those provided for white children.

6. SAME—OHIO STATUTE NOT IN CONFLICT WITH FOURTEENTH AMENDMENT.

The provisions of the Ohio statute upon the subject (section 4008, Ohio Rev. St.) are not in conflict with the fourteenth amendment.

State v. McCann, 21 Ohio St. 198, followed.

Indictment for Deprivation of Civil Rights. It charged that one John Buntin deprived James H. Vines and others, children of Jacob H. Vines, of a right secured by the constitution and laws of the United States, to-wit, the right to attend the only public school situated in a certain subdistrict in Washington township, Clermont county, Ohio; said children being entitled to attend said school, and said Buntin then being the teacher of said school, and excluding said children therefrom by reason of their being colored children of African descent, under color of a statute of Ohio providing that the

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

school boards of two or more adjoining districts may unite in establishing a separate school for colored children, and under color of a regulation excluding colored children.

The testimony showed that there was no school for colored children in the subdistrict in which the prosecuting witness resided. The school for white children was situated about three miles from his house. The township board of education had established a separate school for the colored children of the township, under the provisions of section 4008 of the Revised Statutes of Ohio, which is as follows:

"When, in the judgment of the board, it will be for the advantage of the district to do so, it may organize separate schools for colored children. The boards of two or more adjoining districts may unite in a separate school for colored children, each board to bear its proportionate share of the expense of such school according to the number of colored children from each district in the school, which shall be under the control of the board of education of the district in which the school is situated."

This school was located about five miles from the prosecuting witness' home.

The other facts appear in the opinion.

Channing Richards, U. S. Dist. Atty., for prosecution.

John Johnston and *H. J. Buntin*, *contra*.

BAXTER, C. J., (*charging jury*.) Much has been said and quite an array of books produced to prove that a *criminal intent* is a necessary ingredient of every crime. The proposition, when properly understood, is correct. But what is a criminal intent? This depends somewhat upon the nature of the crime with which the accused is charged. The decision by Judge Rives, which has been read to the court in your hearing, was made in a case in which a jury commissioner was indicted for excluding colored persons from serving as jurors. The essence of the crime, in that case, consisted in the exclusion of colored men from serving as jurors on account of their color. They might have been excluded for the want of sufficient intelligence, or other good and valid reason; and, if so, the defendant would not have been guilty. Hence the motive actuating the accused became a material inquiry. His motive was the principal element of the crime, and it was incumbent on the government to prove the unlawful intent, which in that case constituted the offence, before a conviction could be lawfully demanded. The same may be said in relation to many other crimes. The crime of passing counterfeit money consists in the passing of it with a knowledge of its spurious character. If passed without such knowledge there would

be no legal guilt. The same may be said of the crime of forgery, as knowledge and an intent to defraud are essential elements of the crime. A great many other cases, illustrative of the principle, might be cited if it were deemed necessary. Let us see how far it is applicable to the case now under consideration.

Through amendments to the constitution of the United States, which now constitute part of that instrument and are parts of the supreme law of the land, those of our fellow-citizens who were held in slavery were emancipated, and clothed with all the rights of citizenship. They have, under the constitution, all the rights that you and I possess. Yea, more: having just emerged from a servile condition, and being incapable of defending themselves against the aggressions of the more intelligent and stronger race, statutes intended to secure to them the full benefit of the recent constitutional amendments have been passed for their special protection. Among others, congress has enacted (Rev. St. § 5510) that "every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any state or territory to the deprivation of any rights, privileges, or immunities secured or protected by the constitution and laws of the United States * * * on account of such inhabitant being an alien, or by reason of his color or race, * * * shall be punished," etc.

It is important to note the intent and scope of this statute. The mere fact of defendant having excluded the colored boy mentioned in the indictment from the privileges of the school taught by him, would not be a violation of the act. More than this must be proven before you will be authorized to convict. He must have been excluded under some color of law, statute, ordinance, regulation, or custom of the state, and on account of his color. If, therefore, this defendant did exclude the colored boy named in the indictment from the privileges of the school taught by him, after being requested by the trustees of the subdistrict to permit him to enter it, claiming the right to do so under authority of the statute providing for the separate education of colored children in schools to be established and maintained for that purpose, and did so on account of his color, the court instructs you that you ought to find him guilty as charged, unless you shall find in his favor upon the question of fact to which I will hereafter direct your attention.

We will, however, before presenting the question of fact upon which the result in this case depends, notice the several defences urged by defendant's counsel:

1. It incidentally appeared in the progress of the examination of the witnesses that a civil suit had been prosecuted against the defendant to recover damages for the deprivation of the rights of the prosecuting witness alleged in the indictment in this case; and it is insisted by counsel that that civil suit in which damages were recovered "exhausted the remedy," and bars this prosecution. This defence, gentlemen, cannot be maintained. The prosecution and recovery in the civil suit does not, in the least, preclude the government from the prosecution of this indictment. The civil suit was for the wrong inflicted on the individual; this indictment is for the wrong done, or supposed to have been done, to the public; and the result of the former case can in no way affect the result to be reached in this one.

2. The defendant has been permitted to introduce witnesses to prove that he is a man of good character. The law presumed as much before the evidence was adduced. This evidence was followed by an elaborate argument, supported by numerous authorities, to impress the court with its importance and value. The *authorities* are all right. But have they any application to the facts of this case? The defendant has testified in his own behalf, and upon his examination admitted that a separate school had been provided for the education of the colored children of his district, to which he thought the prosecuting witness ought to have gone; that notwithstanding the request of the trustees to defendant to receive and instruct the prosecuting witness in the school which he was teaching, he thought he had no right to be taught there; and that, acting under color of the law which provided a separate school for colored children, and because the prosecuting witness was a colored boy, he, the defendant, declined to permit him to enter the school taught by him, but excluded him therefrom. Such is the testimony of the defendant himself. There is, then, nothing left in the case on which the evidence of defendant's good character can have any legitimate bearing. If a defendant, being indicted for a breach of a criminal law, admits all the elements that enter into and constitute the crime, of what avail is good character? If defendant were to deny the facts alleged in the indictment; if he were to insist that the evidence on the part of the prosecution was untrue; if he were to make and present an issue of fact as between himself and other witnesses, or even stand upon his plea of "not guilty,"—then, and in either of such events, the jury, in passing upon the question of defendant's guilt or innocence, would be authorized to consider the evidence of his good character, and give to it just as much weight as they in their judgment believed, in view

of all the other evidence in the case, it was entitled to; and in case the evidence of his guilt or innocence was evenly balanced, evidence of defendant's good character would be sufficient to justify an acquittal. But as the defendant, as a witness, admitted the exclusion of the prosecuting witness from the privileges of the school, and that he excluded him under color and by authority of a statute of the state, and because of his color, the evidence of defendant's good character becomes immaterial, and is entitled to no consideration at your hands.

3. It has been further contended that as defendant was advised by counsel and acted in the belief that he was authorized by law to exclude the witness from the school, he is guiltless of any crime, and entitled, on this ground, to an acquittal. But this position, gentlemen, cannot be conceded. If the advice of counsel could be pleaded and relied on as a good defence to an indictment for a violation of the criminal laws, the execution of these laws would depend more on the construction which the accused and their legal advisers might place upon them, than upon their interpretation by the courts. In fact, if such was the proper ruling, the recent amendments to the national constitution would, through the advice of counsel, and the honest or simulated convictions of offenders, be rendered nugatory or eliminated from that instrument. The principle contended for is, to a limited extent, applicable to civil actions. For instance, if A. procured B. to be prosecuted for an alleged crime, and B. should be acquitted thereof, and sue A. for having had him prosecuted without probable cause, the law, in its tenderness, would permit A. to prove that he acted in good faith upon the advice, honestly obtained, of a reputable attorney, as a defence to B.'s suit. But the principle has not been carried into the criminal law. Such evidence would address itself strongly to the discretion of the court after conviction in mitigation of punishment, but constitutes no sufficient and valid defence to an indictment for crime. The legal profession includes many able, honest, and useful members. But there are others who are deficient in capacity, learning, or honesty, who are incapable of giving sound and wholesome counsel. There are others who it may be are capable of performing a better part, but whose custom is to ascertain what their clients most desire, and advise them accordingly. One-half of the litigation with which the courts are burdened, results, I think, directly or remotely from the misadvice of attorneys. It may be that defendant acted in good faith upon the instructions received from his attorney, and honestly believed that he was acting in accord-

ance with the law; but, notwithstanding, ignorance of the law is not a valid defence, and if you shall find that he excluded the prosecuting witness from the school, under color of the state statute, and on account of his color,—these being the three elements constituting the crime with which he stands charged,—it will be your duty to find him guilty, unless you shall find for defendant, as has been previously stated, on the question of fact to which your attention will now be directed.

The negro, under the national constitution and laws, is invested with precisely the same rights that are possessed by the white race, and subject to the same duties, obligations, and liabilities. The school which defendant was teaching was a *public* school, established and maintained with public money, to which every child, whether white or black, of that school district, had the right to go for instruction, unless some other school of substantially equal merit had been provided for them. It is, however, insisted that such provision had been made for the prosecuting witness. That there was such a school in that district for the education of colored children is conceded. The supreme court of the state has held that such a classification of the two races is within the constitutional discretion of the legislature, and that the separate education of the whites and blacks in accordance with the terms of the law is no wrong to either.* I concur in and adopt this decision as a correct exposition of the constitution, and instruct you that if there was such a school in the district for the education of colored children, affording substantially the same educational advantages as were afforded by the school from which the prosecuting witness was excluded, and reasonably accessible, it was his duty to have gone there, and the defendant did him no wrong in the exclusion complained of. But if, as has been contended, you shall find that said colored school was so remote from the prosecuting witness' residence that he could not attend it without going an unreasonable and oppressive distance; that he was thus placed at a material disadvantage with his white neighbors; that the school did not offer substantially the same facilities and educational advantages that were offered in the school established for the white children, and from which he had been excluded,—then and in that event he was entitled to admission in said last-named school, and his exclusion therefrom was a denial and a deprivation of his constitutional right. How the facts are it is your province to decide. Upon your finding

**State v. McCann*, 21 Ohio St. 198.—[REP

upon this question the guilt or innocence of defendant depends. If, then, you shall find that another school of equal merit had been provided, reasonably accessible to the witness, offering the same, or substantially the same, educational facilities and advantages, said witness ought to have availed himself of it, and was subject to no wrong in being excluded from the other; and in that event your verdict ought to be for defendant. But, if the contrary is true, the defendant would be guilty, and you ought so to find. Take and consider the case, and report your verdict to the court.

The jury disagreed.

NOTE.

1. PUBLIC SCHOOLS. The question in the principal case as to the constitutionality of laws providing separate schools for colored children does not arise, as has been sometimes supposed, under the clause of the fourteenth amendment prohibiting the states from making and enforcing "any law which shall abridge the privileges or immunities of citizens of the United States." This provision refers only to those privileges and immunities which are derived as citizens of the United States, as distinguished from those derived as citizens of the state. In the *Slaughter-house Cases*, 16 Wall. 36, this distinction is pointed out, and the general character of the rights embraced within each class explained. The right to attend the public schools of a state clearly does not come within the first class. Education is a subject of domestic concern. The legislature of a state may determine to have no system of public instruction at all; but when it has created such a system, the clause of the fourteenth amendment, prohibiting any state from denying "to any person within its jurisdiction the equal protection of the laws," controls the power of the state over the enjoyment of the rights conferred by such system. The weight of authority accords with the view of the learned judge deciding the principal case, that this provision still leaves it within the discretion of the legislatures of the several states to provide separate schools for colored children. These cases maintain that equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes, or of keeping different grades of scholars, in the same school; that "equality of rights does not necessarily imply identity of rights." But all these decisions hold that the advantages afforded by such schools must be, in all respects, substantially equal to those furnished by the schools for white pupils. *Bertonneau v. Directors*, 3 Woods, 177; *State v. Flood*, 48 Cal. 56; *Corry v. Carter*, 48 Ind. 327; *State v. McCann*, 21 Ohio St. 198; *People v. Gaston*, 13 Abb. (N. Y.) Pr. (N. S.) 160; *County Court v. Robinson*, 27 Ark. 116. See concurring opinion of Clifford, J., in *Hall v. Du Cuir*, 95 U. S. 504-506; and the excellent discussion of the question in Cooley, Torts, 286 *et seq.*

In *State v. Flood*, *supra*, under a statute in California providing for separate schools, similar to that of Ohio, but where such separate school had not,

in fact, been established, it was held that colored pupils must be admitted to the schools provided for whites. Under a similar state of facts, in *State v. Duffy*, 7 Nev. 342, it was decided that no right secured by the fourteenth amendment had been violated, but that such exclusion was contrary to the state constitution. That such a discrimination is not also covered by the last clause of the fourteenth amendment, guarantying to all persons the equal protection of the laws, may well be questioned; and it is submitted that the best-considered authorities recognize such protection. *Van Camp v. Board of Education*, 9 Ohio St. 406, (1859,) which arose before the adoption of the fourteenth amendment, relief was denied, although no separate school had been established; but as to this see *State v. McCann*, 21 Ohio St. 208. And see, also, *Roberts v. Boston*, 5 Cush. 198, (1849,) where it was held that under the constitution and laws of Massachusetts different schools could be provided for the two races.

Opposed to this view stands the *dictum* of a majority of the supreme court of Kansas in the case of *Board of Education v. Tinnon*, 13 Cent. Law J. 272, decided last September. The court contends that if the separation of scholars on the color line can be sustained, pupils of different nationalities can be divided,—those of Irish descent from those of German descent, etc. The questions decided in that case are that no power has been conferred upon boards of education of cities of the second class to exclude colored children from any of the schools of the city, and that without such power they have no authority to do so. The opinion of *Valentine, J.*, in his able argument against a caste classification, is an excellent example of the advanced and progressive spirit of our western states. Under the constitution and laws of Iowa and Michigan it has been held that boards of education have no right to deny scholars admission to any school on the ground of color. *Clark v. Board of Education*, 24 Iowa, 266, (1868;) *People v. Detroit*, 18 Mich. 400, (1869.)

Mandamus is the proper remedy to enforce admission to the school. *Board v. Tinnon*, (Sup. Ct. Kan. 1881,) 13 Cent. Law J. 272; *Clark v. Board*, 24 Iowa, 266; *People v. Detroit*, 18 Mich. 400; *State v. Duffy*, 7 Nev. 342; *Ward v. Flood*, 48 Cal. 36; *Corry v. Carter*, 48 Ind. 327; High, Ex. Leg. Rem. § 332.

2. STATE ACTION. It will be observed that the inhibitions of section 1 of the fourteenth amendment are all directed solely against state action. In the language of Justice Strong its provisions have reference to "state action exclusively, and not to any action of private individuals." *Virginia v. Rives*, 100 U. S. 313, 318; *Ex parte Virginia*, Id. 339; *Strander v. West Virginia*, Id. 303; *Neal v. Delaware*, 103 U. S. 370; *Texas v. Gaines*, 2 Woods, 342; *Miller v. Mayor*, 13 Blatchf. 469; *Illinois v. C. & A. R. Co.* 6 Biss. 107; *U. S. v. Cruikshank*, 92 U. S. 542; *State v. Dubuelet*, 5 Rep. 201; *Re Wells*, 17 Alb. L. J. 111. The prohibitions of the amendment upon the state, extend to all the agencies and instrumentalities employed in the administration of its government, whether superior or subordinate, legislative, executive, or judicial. *Ex parte Virginia*, *Virginia v. Rives*, *Neal v. Delaware*, *supra*; *Ah Kow v. Nunan*, 5 Sawy. 552; 18 Am. Law Reg. (N. S.) 676; *Re Parrott*, 1 FED. REP. 481.

3. CIVIL RIGHTS ACT OF MARCH 1, 1875. Senator Sumner's civil rights bill (act of March 1, 1875; 18 St. at Large, 336) provides "that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theaters, and other places of public amusement, subject only to the conditions and limitation established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." It is apparent that this enactment attempts to secure rights that come from the states, and which are not, therefore, covered by the second clause of the fourteenth amendment, which prohibits the states from abridging the "*privileges or immunities of citizens of the United States*." The decisions of the supreme court of the United States, above referred to, would seem to have settled that both this and the succeeding clauses of the amendment are directed only against action by some of the agencies of the state, and do not reach the conduct of private individuals, leaving that for adjustment by the state. In its application to foreign and interstate commerce it is submitted that the provision is within the power granted congress to regulate commerce. *Hall v. De Cuir*, 95 U. S. 485, 490. A short time after the passage of the civil rights act of 1875, Judge Emmons held that the inhibitions of the fourteenth amendment were aimed only at the action of the state, and have no reference to individuals; that the right to "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of theaters and inns" come from the state, and the protection of that right is not within the power of congress, and that, therefore, the civil rights act is to that extent unconstitutional. Charge to Grand Jury, (May, 1875, U. S. C. C., W. D. Tenn.) 2 Am. L. T. Rep. (N. S.) 198. The reasoning of this eminent judge appears to be altogether satisfactory and conclusive. The same question was presented to Judges Blatchford and Choate, and they divided and certified it to the supreme court. *U. S. v. Singleton*, 1 Crim. Law Mag. 386. Judge Cadwalader held that the provisions of the act forbidding and punishing discriminations in the use of inns, theaters, public conveyances, etc., on the ground of color, were a warranted exercise of the legislative power vested in congress by the fourteenth amendment, and that a clerk in charge of an inn, who refuses accommodations to a traveler on the ground of his color, is liable to indictment and punishment under the act. *U. S. v. Newcomer*, (U. S. D. C., E. D. Pa. Feb. 1876,) 22 Int. Rev. Rec. 115. The opinion is little more than an announcement of this conclusion, without stating the reasons therefor. These decisions still leave it uncertain how far the act can be sustained as coming within the powers granted congress by the constitution and its amendments. For a clear and thoughtful discussion of the question see Judge Cooley's work on Torts, pages 284-6. In an indictment and in a civil action for penalty, under the civil rights act of March 1, 1875, the citizenship of the person injured must be alleged and proved. *U. S. v. Taylor*, 3 FED. REP. 563; *Lewis v. Hitchcock*, 10 FED. REP. 4; 13 Rep. 299. What is an "inn" within the terms of the act, and what is a sufficient pleading in an action for penalty for the denial of the privileges thereof, see *Lewis v. Hitchcock*, *supra*. Section 4 of the act of March 1, 1875, providing that no person shall be disqualified to serve

as "a grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude," and prescribing a penalty for such exclusion, refers to action by an agency of the state, and is within the power granted by the fourteenth amendment. *Virginia v. Rives*, *Strauder v. West Virginia*, *Ex parte Virginia*, and *Neal v. Delaware*, *supra*. As to indictment of officers for violation of this section, see *Re Co. Judges of Virginia*, 3 Hughes, 576.

4. CHINESE. Although, as expressed in the *Slaughter-house Cases*, the war amendments were adopted primarily for the emancipation and protection of the African race, their power is not circumscribed to such limits. They have already, and will in the future, serve a vastly wider and more beneficent purpose. The prohibitions of the fourteenth amendment have been found effectual to protect the Chinaman against the viciously-oppressive legislation of the Pacific states. The opinions of the federal judges, and particularly of Justice Field, in the cases cited below, are admirable illustrations of the substantial progress made towards broad and enlightened views of human rights and equality. Thus the San Francisco "Queue Ordinance," providing that prisoners in the county jail shall have their hair clipped to a uniform length of one inch from the scalp, being directed especially against the Chinese, and inflicting a cruel and degrading punishment upon them, (*Ah Kow v. Nunan*, 5 Sawy. 552, *Field*, J.; S. C. 18 Am. Law Reg. N. S. 676, and note by Judge Cooley;) the statute of California prohibiting all aliens incapable of becoming electors of the state from fishing in the waters of the state, (*In re Ah Chong*, 2 FED. REP. 733, *Sawyer*, J.); the statute of California requiring a bond to be given that Chinese emigrants shall not become a charge upon the public, (*Re Ah Fong*, 3 Sawy. 144, *Field*, J.); the constitution and statute of California forbidding the employment of Chinese or Mongolians by corporations, and punishing any officer or agent thereof who hires them, (*In re Parrott*, 1 FED. REP. 481, *Hoffman*, J.)—have all been held to be in conflict with the fourteenth amendment and void.

5. MISCEGENATION. The laws of the southern states forbidding the marriage of white and colored persons have been held not to be obnoxious to the fourteenth amendment. *Ex parte Kinney*, 3 Hughes, 9; *Ex parte Francois*, 3 Woods, 367; *Ex parte Hobbs & Johnson*, 1 Woods, 537; *Goss v. State*, (Sup. Ct. Tenn. Oct. 1880), 24 Alb. L. J. 118. See 1 Bishop, Mar. & Div. § 308 *et seq.* The imposition of a severer penalty on a man and woman of different races for living together in adultery or fornication than that imposed for the same offence upon persons of the same race, does not contravene the fourteenth amendment and civil rights act. *Green v. State*, 58 Ala. 190; overruling *Burns v. State*, 48 Ala. 195.

6. TRAVELING ACCOMODATIONS. The provisions of the civil rights act of March 1, 1875, (18 St. at Large, 336,) have been referred to heretofore in section 3 of this note. Independent of such statute, (to use the language of Judge Cooley,) "it is not very clear that inn-keepers and carriers of persons by land or by water would be warranted in law in discriminating on the ground solely of a difference in race, color, or because of any previous condition." They are public servants, and are only permitted to make discriminations which are

reasonable and founded in good public policy. It will be seen by the authorities hereafter referred to that wherever carriers or inn-keepers have been permitted to provide separate accommodations, that it has been required that such accommodations should afford equal advantages and facilities in every respect with those furnished whites; and even this discrimination, limited as I have mentioned, is not clearly justifiable. Cooley, Torts, 283 *et seq.*; *Westchester, etc., R. Co. v. Miller*, 55 Pa. St. 200.

The case of *Railroad Co. v. Brown*, 17 Wall. 446, arose under an act granting certain privileges to a railroad company, which provided that "no person shall be excluded from the cars on account of color;" and the supreme court of the United States held "that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars; and that the enactment was not satisfied by the company providing cars assigned exclusively to persons of color, though they were as good as those assigned exclusively for white persons, and, in fact, the very cars which were, at certain times, assigned exclusively to white persons." In *Chicago, etc., Ry. Co. v. Williams*, 55 Ill. 185; S. C. 8 Am. Rep. 641, (1870,) it was held that, if a car had been set apart for the exclusive use of ladies, and gentlemen accompanied by ladies, a colored woman could not be excluded upon the ground of her color; but the court suggested that the carrier's duty would probably be performed if it furnished a separate car or seats equally as comfortable for colored women. See *Day v. Owen*, 5 Mich. 520, (1858;) Thompson, Car. Pass. 335; Hutchinson, Carriers. Where a colored lady passenger on a steam-boat was not permitted to dine in the cabin, but was offered accommodations on the guards or in the pantry, a recovery against the carrier was sustained. The court held that under the laws and constitution, and its amendments, of the state of Iowa and of the federal government, a person of color is entitled to the same rights and privileges when traveling as a white person, and cannot be required by any rule or custom, based on distinctions of race or color, to accept other or different accommodations than those furnished to white persons. *Coger v. N. W. Union Pack. Co.* 37 Iowa, 145. See this case referred to by Justice Clifford in *Hall v. De Cuir*, 95 U. S. 507, 508. A railroad company may rightfully exclude from the ladies' car a female passenger whose reputation is so notoriously bad as to furnish reasonable grounds to believe that her conduct will be offensive, or whose demeanor at the time is annoying to other passengers; but mere unchastity will not warrant her exclusion from such car whether she be white or colored. *Brown v. Memphis, etc., R. Co.* 5 FED. REP. 499; 11 Rep. 424; 12 Cent. Law J. 442. Inn-keepers and carriers may provide separate accommodations for colored guests and passengers, but they must be equal in quality and convenience with those furnished white persons. *The Civil Rights Bill*, 1 Hughes, 541, 547; *Green v. City of Bridgetown*, (Dist. Ga.) 9 Cent. Law J. 206. See *Cully v. B. & O. R. Co.* 1 Hughes, 536. Also under the Pennsylvania statute prohibiting classification on account of color. *Central R. Co. v. Green*, 86 Pa. St. 427. Laws have been adopted in some states securing to all persons equal rights in the vehicles of common carriers, at theaters, inns, etc., and giving a right of action for the denial thereof; and such legislation has been fully sustained. *Joseph*

v. *Bidwell*, 28 La. Ann. 382; *Donnell v. State*, 48 Miss. 631. As to the discriminations on account of sex under the constitution of California see *Ex parte Maguire*, 12 Rep. 9.

Congress may, by legislation, provide against discriminations on account of color in interstate commerce, but legislation by the states upon that subject is a regulation of interstate commerce, and therefore unconstitutional and void. *Hall v. De Cuir*, 95 U. S. 485.

Cincinnati, March, 1882.

J. C. HARPER.

BRETT and others, Adm'rs, etc., v. QUINTARD, Adm'r, etc.

(Circuit Court, D. Connecticut. February 16, 1882.)

I. PATENTS—OPERATION OF DEVICES.

Where the plan of operation in two sets of devices, intended to produce the same result, is radically different, the one is not an infringement on the other.

2 SAME—METHODS SIMILAR—INFRINGEMENT.

Where the method pursued by a subsequent invention is substantially the same as that under a prior invention, it is an infringement.

In Equity.

E. N. Dickerson, for plaintiffs.

John H. Perry and *Henry T. Blake*, for defendant.

SHIPMAN, D. J. This is a bill in equity, originally in favor of Eliza Wells, as administratrix of the estate of Henry A. Wells, to restrain Elbridge Brown from the infringement by the use of the "Gill machine" of reissued letters patent of May 19, 1868, No. 2,942, for "improvements in machinery for making hat bodies of fur," commonly known as the "hat-body patent." Since the commencement of the suit the plaintiff and defendant have both died. The present plaintiffs are the administratrix and the administrator of the estate of Henry A. Wells. The defendant is the administrator of the estate of Elbridge Brown. Under the decree as directed to be modified, and the pleadings in the case as directed to be amended, the hearing was confined to the question of the infringement by the defendant's intestate of the fifth and sixth claims of reissue No. 2,942. I assume that the plaintiffs proved the uses of the Gill machine by the defendant's intestate.

The state of the art relating to the manufacture of hat bodies of fur, the characteristics of the Wells invention, the original Wells patent and its reissues, the first four claims of the last reissue, the mode of construction of his machine, and the general appearance and

the different parts of the Gill machine, are described either in *Burr v. Duryea*, 1 Wall. 531, or in *Gill v. Wells*, 22 Wall. 1.

The manufacture of hat bodies by the deposition of fur thrown from a picker upon an exhausted revolving cone was old at the date of the Wells invention. It is said in *Burr v. Duryea* that—

“The aim and object of both Wells and Boyden was to construct an automatic machine which would distribute the fur on the cones so that the bat might be thicker in certain portions than on others. This was the defect of former machines, which each proposed to remedy. * * * The great and peculiar characteristic of the Wells invention is a tunnel or chamber constructed as described. Instead of the picker, he used a rotating brush to distribute the fur from the feed-aprons, and throw it forward into the chamber which conducted it to the cones. The hinged hood and flap were devices to distribute the material in unequal quantities, to accomplish the object of making the bat thicker in one part than another.”

The chamber or tunnel is, as is said by the patentee in his original patent, “gradually changed in form towards the outlet, where it assumes a shape nearly corresponding to a verticle section passing through the axis of the cone, but narrower, for the purpose of concentrating and directing the fur thrown by the brush onto the cone.” The cone is in front of the delivery aperture of the chamber.

The fifth and sixth claims of reissue No. 2,942 are as follows :

“(5) The combination of the feed-apron, on which the fur fibers can be placed in separate batches, each in quantity sufficient to make one hat body; the rotating brush or picker, substantially as described; the rotating previous cone, provided with an exhausting mechanism; and the device for guiding the fur fibers, substantially as described; the combination having the mode of operation specified, and for the purpose set forth. (6) In combination with a previous cone, provided with an exhausting mechanism, substantially as described, the covering cloth wet with hot water, substantially as and for the purpose specified.”

The fifth claim was for the combination of the feed-apron, rotating brush or picker, rotating previous cone, provided with an exhausting mechanism, and the trunk or tunnel with its hinged hood and flap, made substantially as described. It implies that the sides of the trunk are to be united at their edges, and that the trunk is a unit and not a collection of separate devices; but the mere fact that the sides were taken apart would not defeat the charge of infringement.

The engraving on page 11 of 22 Wall. shows the Gill machine, except that the deflectors which it is said regulate the deposit of fur upon the band of the hat are not shown. These deflectors consist of blocks of wood fastened to the interior wall of the Gill case near the bottom, the

upper end of the blocks being inwardly and downwardly inclined, and forming, in the language of the plaintiffs' expert, "an annular deflector which surrounds the cone at a prescribed distance from its base."

In considering the question of infringement of the fifth claim, first, upon the theory that the different guiding devices of the Gill machine are the four sides of the Wells trunk, when taken apart, it cannot be denied that the various parts of the Gill mechanism perform the office of guiding the fur into the case to a point or points where it can be influenced by the exhaust mechanism, and that the deflectors of the Gill machine perform the office of concentrating the fur upon the different parts of the cone where it is desired that the thicker portion of the bat shall be deposited; and it may also be conceded that the extensible plate of the Gill machine, which receives the fur from the rotating brush, performs the office of the top plate of the Wells trunk with its hood, and in substantially the same way.

The plaintiffs insist that the annular ledges near the bottom of the Gill case are the equivalent of the hinges upon the end of the bottom plate of the Wells machine. This similarity relates only to the end of the bottom plate. It is not claimed that the Gill machine has that portion of the bottom plate of the Wells machine which is between the picker and the hinged flap.

It is next claimed that the side guides of the two machines are the same. The side pieces of the Wells trunk converge as they approach the cone both horizontally and vertically, and guide the fur in a direction towards the side of the cone; and it is admitted that this convergence may be essential in the form in which the Wells machine is organized, as shown in the patent. But it is claimed that the side guides of the Gill machine are connected with the top of the case, and that the case, with its converging walls, forms a continuation of these guides down to the annular deflector inside of the case, and that the Gill case is in one respect a "tunnel" which confines the fur-bearing current and prevents the lateral escape of the fur from the influence of the exhaust current, and, in that respect, performs, as to the vertical downward current of fur, the function which the side guides in the Wells machine perform as to the horizontal current of fur in that machine.

The decisions of the supreme court in regard to the Wells invention and reissue restrict the invention, as secured by the patent, within narrow limits, as compared with those which were placed upon the patent at the earlier trials. Bearing in mind the limita-

tions which were put upon the reissue by the supreme court, and that the characteristic of the invention is the trunk, with its hood and flap, constructed substantially as shown in the drawings, I am of opinion that the attempt to make the side boards of the Gill trough, and the walls of the Gill case, to be substantially the same thing with the side pieces of the Wells trunk, cannot be successful. In view of these limitations, the aid of fancy is now required to convert the annular ledges upon the lower part of the Gill case into the hinged flap of the Wells trunk. This equivalence cannot be found, except upon the view which is stated by the plaintiffs' expert to be the one which he entertains, and which is that the end of the lower plate, in the Wells machine, "is present in any machine where there is a guide so related to the cone, and to the devices by which the fur-bearing currents are set in motion, that it governs the quantity of fur supplied to the lower part of the side of the cone, and acts in conjunction with a non-fur-bearing current which is admitted to the perforations at the base of the cone."

Neither are the trough and the walls of the hopper, and the ledges at the bottom of the wall, taken together, the equivalent of the trunk of the Wells patent. It is true that each structure accomplishes the same result, of conveying fur to the cone so as to make a graduated hat body; but the two conduits are not constructed in the same way. The plan of operation in these two sets of devices is not the same. In the Wells machine all the sides of the trunk co-operate with each other to confine the fur-bearing current, to guide it in a horizontal direction towards the vertical section of the cone, and to deliver it in a shape which conforms to that of such section. In the Gill machine the bottom plate and the side guides guide the stream of fur to the upper part of a case or hopper of large dimensions, as compared with the cone, and then, the course of the fur being changed by the powerful exhaust current, it falls upon all sides of the cone, which is placed at the bottom of the hopper. There is a guiding and directing operation by the plates and deflectors of each machine; but the Wells machine guides directly to the cone, while in the Gill machine the current of fur is conveyed in a trough, open at the top, to the upper part of a hopper, and thence restrained and deflected by the converging walls of the hopper, it is drawn to the cone by the exhaust. These differences are not merely formal, but make two radically different vehicles for the transmission of fur, and the reason for this dissimilarity of construction is because the respective methods by which the fur is driven to the cone are not

alike. In each machine the blast and exhaust currents co-operate. It is impossible for me to say, in view of the history of the litigation in regard to these two machines, that the blast current in the Gill machine does not aid the exhaust current in directing the fibers to the cone. But I am of opinion that after the fur is blown into the hopper the influence of the exhaust current in directing the fur to the cone is the predominant influence, and this difference in the mode of operation of the two machines compels a difference of construction.

Upon the question of the infringement of the sixth claim there was naturally a disagreement between counsel upon the question whether the case was to be entirely retried. The counsel for the plaintiff, supposing that the uses and the manner of use of the wet cloth by the defendant's intestate had been sufficiently proved before Judge Woodruff, made no formal proof of the manner in which the bat was taken from the cone, but simply introduced expert testimony that such use was an infringement. I shall assume that the method of removing the bat from the cone, which is described by Prof. Trowbridge, the defendant's expert, on page 7 of the printed testimony, was the method pursued by the defendant's intestate. If so, there was an infringement of the sixth claim. If the defendant asserts that this was not the method which was practiced, he will be at liberty, upon verified petition, to open the case and introduce proofs to that effect.

Let there be a decree for the plaintiffs for an accounting in respect to the sixth claim.

HART v. THAYER.*

*(Circuit Court, S. D. New York. February 13, 1882.)***1. LETTERS PATENT—IMPROVEMENT IN NECK-TIES—REISSUE—NEW MATTER.**

The specification of reissue No. 7,909, granted October 9, 1877, for an "improvement in neck-ties," is an effort to enlarge the scope of the patent beyond what is warranted by the original; and the second claim thereof, if construed to mean anything more than the original, covers new matter.

2. SAME—SAME—SAME—CONSTRUCTION OF.

Such reissue must be limited to but two ways of fastening the pin to the shield of neck-ties,—(1) by rivets passing through the body of the pin and headed, and (2) by rivets punched out of the body of the pin and bent over or clinched on the shield,—and is not infringed by the invention described in letters patent No. 206,673, in which the pin itself is bent and then passed through the shield, part of it being on one side of the shield and part on the other.

In Equity.

F. H. Betts and J. Van Santvoord, for plaintiff.

J. P. Fitch, for defendant.

BLATCHFORD, C. J. This suit is brought on reissued letters patent No. 7,909, granted to the plaintiff, October 9, 1877, for an "improvement in neck-ties;" the original patent, No. 159,921, having been granted to him February 16, 1875. The specification of the reissue is as follows, reading what is outside of brackets and what is inside of brackets, omitting what is in italics:

"Figure 1 is a face view of the device embodying my invention. Figure 2 is a side view thereof, partly in section. Figure 3 is a side view, enlarged, of a detached part. Similar letters of reference indicate corresponding parts in the several figures. In the class of neck-ties wherein the front bow, which is made long and lies on the chest, is held in position by a band which passes around the neck, it is necessary to secure said band in some manner to prevent displacement of the tie. For this purpose pins have been sewed to the shields or supporting plates of the ties and the neck-bands engaged therewith; but this is objectionable, since the pin soon loosens and is lost. Again, the cost of thus attaching the pins is a matter of considerable moment. My invention is designed to remedy these defects, and consists in securing the pins to the shields by metallic fastenings, whereby the pins are firmly retained in place, longer service is rendered thereby, and there is a cheapness in the product. Referring to the drawings, A represents a shield or supporting plate for a neck-tie, which consists of a long bow or knot, *a*, constituting the front portion, and a band, *b*, which passes around the neck, the two parts being shown in dotted lines. To the bottom portion of the shield or plate I secure a pin, B, which projects downwardly so that the band, *b*, may be attached thereto, in order that the band will not disengage from the neck and release

*Reported by S. Nelson White, Esq., of the New York bar.


the tie. I secure the pin to the shield by metallic rivets [or projections,] C, which readily clinch on the shield and firmly connect the two parts. These rivets [or projections are attached to the pin in any suitable manner, and they may be parts of the pin itself, or they may be separate pieces of metal fastened to it. Thus they] may be passed through the flattened body of the pin *and the shield* and headed, or [they may be] punched out of the said [body,] *body*. [The metallic rivet or projection is passed through the shield] and [is] bent over [and] or clinched [upon the opposite side,] *on the shield*. It will be seen that the connection of the pin and shield is firm and [durable] *durable*. [Whereas] *I overcome loosening of the pin due to cutting of the threads [formerly] which heretofore* in use [passing] *have been passed* through openings in the pin, [were cut by their edges, or rotted away from corrosion of the pin through] *or rotting of said thread consequent to perspiration,* [and the pin was soon lost or loosened] *corroding the pin*. Again, as the work can be performed by machinery, instead of stitching or sewing by hand, labor is materially reduced, whereby there is [a] great saving in the [cost of production] *product*. [I do not claim any particular method of attaching the metal fastenings to the pin, since any of the well-known methods of attaching metals together may be employed,—either cohesion by welding or soldering, or forming both pin and fastenings out of one piece of metal or adhesion and pressure by making one metal enclose the other.”]

Reading in the foregoing what is outside of brackets, including what is in italics, and omitting what is inside of brackets, gives the text of the original specifications. The claims of the reissue are as follows:

“(1) The pin, B, and neck-tie shield, A, in combination with the metallic fastening, C, substantially as and for the purpose set forth. (2) The pin, B, formed with the fastening, C, in combination with the neck-tie shield, A, substantially as and for the purpose set forth. (3) A metallic fastening, or metallic fastenings, C, attached to and projecting from the pin, B, substantially as and for the purpose set forth.”

The original patent had only two claims. The first was the same as claim 1 of the reissue; the second was the same as claim 2 of the reissue, with the words “punched out” inserted between “the” and “fastening.”

It is claimed that the defendant has infringed claim 2 of the reissue by making and selling neck-tie shields with pins, such as are described in letters patent No. 206,673, granted to Albert M. Smith and Hiram H. Thayer, April 23, 1878. The pin is of metal, pointed at one end. In its length are two bends, which are nearly at right angles to the length of the body. One bend is further from the point than the other bend is from the opposite end. Each bend is made by two right-angled deflections of the body of the pin. From the bend near the end furthest from the point, the body of the pin

proceeds on in a line, not continuous with the line of the pin the other side of said bend, but parallell therewith. The other bend is so made as to bring back the line of the pin between said bend and the point to the line of the pin the other side of the first-named bend. The shape of the pin, with the two bends, is this: 

The pin is attached to the shield by passing it through two holes in the shield, one hole at each end, so that the two ends of the pin are on one side of the shield, and the middle part or body is on the other side of it. The bends are abrupt or short, and form shoulders which bear in the holes, and keep the pin from moving or slipping back and forth. The pin, after it is in the shield, is flattened, especially at the unpointed end, so that it will lie more closely and firmly to the shield and not project from its surface. The pin is put into the shield and fastened by springing its ends together sufficiently to put them through the holes made for them in the shield. The claim of the patent is to the combination of the shield with the pin, constructed and arranged to operate substantially as and for the purpose thus set forth.

The original patent, No. 159,921, speaks of only two ways of forming the fastenings of the pin. One is to have metallic rivets passing through the body of the pin, and headed. The other is to have the rivets punched out of the body of the pin and bent over or clinched on the shield. The first claim of that patent is for a combination of three things—the shield, the pin, and the separate rivet-fastening. The second claim is for a combination of the shield and the pin, having rivets punched out of its body. But, with either form of fastening, the entire pin, when in place, is on one side of the shield, and the bent-over or clinched or headed ends of the fastenings are on the other side of the shield. The body of the pin is straight and continuous, aside from the supplementary fastenings. In the defendant's pin the body is not straight, and there are no supplementary fastenings. The body of the pin, by being bent, fastens itself. Manifestly the effort in the specification of the reissue is to enlarge the scope of the patent beyond what is warranted by the original. The reissue says that the projections may be "parts of the pin itself."

No way is shown in the original of making the projections parts of the pin itself, except by punching them out of its body. That means partly detaching part of the body, and letting it form a fin or projection, to be bent down and clinched on the other side of the shield. The defendant's bends are parts of the pin itself, but they are not projections *from* the body, as in the plaintiff's pin, but are projections

of the whole body in its devious path. The second claim of the reissue, if construed to mean anything more than the second claim of the original, so as to cover the defendant's pin, covers new matter not found in the original, and is for an invention not shown in the original. That defence is set up in the answer. The only pin with a fastening forming part of its body, described or shown in the original, is a pin with a fastening punched out of its body. A pin formed with a fastening, which is part of the pin itself, is a form of description ingeniously devised to cover a punched-out fastening, and also such bent fastenings as those in the defendant's pin. But the claim cannot be construed to cover any fastening but a punched-out fastening, or one that is its equivalent.

The defendant's bent fastenings are not equivalents. They are an invention in a new direction, not based on the plaintiff's idea. As against the plaintiff's pin, the defendant's is patentable, and not an infringement of claim 2 of the plaintiff's reissue. The radical difference between the two pins is that the principle of fastening is different in the two, the defendant's pin dispensing with all fastenings that are separate from the pin itself, or that are partly detached parts of the body as fastening devices separate from the whole body. As an incident of the difference in structure, and illustrating it, no two portions of the defendant's pin on opposite sides of the shield are directly opposite to each other. The parts do not form the jaws of a clamp, as in the plaintiff's. The shield is held by virtue of the strength of the cross section of the pin, and not by the clamping action of two directly opposite parts.

The bill is dismissed, with costs.

BRUCE v. MARDER and others.*

(Circuit Court, S. D. New York. February 22, 1882.)

1. LETTERS PATENT—IMPROVEMENT IN PRINTING TYPES—PATENTABILITY.

Letters patent No. 139,365, granted David W. Bruce, May 27, 1873, for an "improvement in printing types," are not void for want of patentability as being merely for increasing the size of types for figures, nor, when construed in connection with the specification, are they anticipated by the fact that types for figures cast with the body of the type two-thirds the width of the body of the line, were known and in use before.

In Equity.

Benj. F. Lee, for orator.

H. F. Pultzs, for defendants.

WHEELER, D. J. This suit is brought upon letters patent No. 139,365, dated May 27, 1873, granted to the orator for an improvement in printing types. The improvement consists in having types for figures cast two-thirds the width of the body, which is the height of the type, and with correspondingly larger faces, whereby the type can be more readily set, because they can be justified, as printers say, by two of the ordinary three-in-em spaces, and because the print is much more legible. The defences are want of patentability of invention and want of novelty. The claim in controversy of the patent is for "figures and fractions in printing-type cast upon a block equal to two-thirds the width of the body of the 'em' or standard type."

If this claim was to stand upon its own terms merely it would cover only the size of the body of type on which figures are cast, and not the size of the figures themselves, as cast upon the body, and the patent as involved here would have to be considered in that view. But the specification sets forth the old method of casting type for figures, and the indistinctness on account of smallness of the figures as one of the disadvantages of that method, and then proceeds: "To obviate this indistinctness I construct the figures broader by casting them two-thirds of the width of the body," etc., and refers to the accompanying drawings, which show large-faced figures contrasted with small ones as a part of the improvement. The claim is to be read in connection with the specification as if there was added to it the phrase "as specified," or "as set forth." Read in that light the claim is for the broader figures, as well as for the broader body of the type.

*Reported by S. Nelson White, Esq., of the New York bar.

The claim of lack of patentability rests upon the argument that there can be no invention in merely increasing the size of the types for figures, or the width of the body of the type, and none in doing both. At first it would seem that this argument was well founded as to scope of the patent, and sound. But a closer examination of the subject shows that the patent involves more than either of these things, or the combination of both. The invention is not merely of an increase of the size of type for figures. Figures in printing are to be used in the same body of type with letters, and the whole are to be justified, in the language of printers; in other words, spaced so as to fill out the lines. By the old method figures were cast on types one-half the width of the body of the line, whatever the size of the type might be; and an increase of the size of the figures made necessary an increase of the size of the whole. The orator invented a method of increasing the size of the figures without increasing the size of the type of the letters and the body of the line, and a method of conveniently justifying the types for figures by making the width of the body of the type exactly two-thirds of the width of the body of the line, so that they could be justified by two of the ordinary three-in-em spaces, whatever the size of the type of the body of the line might be. This involved finding a new rule of proportion between the sizes of letters and the sizes of figures, and one that not only would give more legible figures, but such as would be more legible without increasing the size of the letters with which they should be printed, and such size of body of type on which to cast the figures that the types could be used conveniently, and economically of space. This required more than mere mechanical skill; it made necessary the creative genius of the inventor. The testimony of practical and largely-experienced printers taken in the case shows that his method was not known before his invention; that it has been of great utility and gone largely into use since. This shows that he discovered and put to use what others skilled in the art had overlooked; that it was very desirable when known, and would very probably have been found out before if ordinary skill in that art could have discovered it. On the whole, the presumption of patentability arising from the grant of the patent is not only not overthrown, but is well sustained.

The evidence as to prior knowledge and use establishes fairly enough that types for figures were cast with the body of the type two-thirds the width of the body of the line before this invention; and if that was all of the invention, or if the claim was to be construed according to its own terms without resort to the specification, so that

no more would be patented, the want of novelty might be made out. But, as before attempted to be shown, the invention involves the increase of the size of figures in proportion to the size of letters in connection with this size of the body of the type, and the whole of that does not appear with the requisite clearness to have been known or used before.

Let there be a decree that the patent is valid, that the defendants infringe, and for an injunction and an account according to the prayer of the bill, with costs.

HARDY and another v. MARBLE.*

(Circuit Court, S. D. New York February 11, 1882.)

1. LETTERS PATENT—REISSUE 7,729—CORSET CLASP—INFRINGEMENT.

A preliminary injunction refused, it being doubtful whether, in view of the language of the specification and claim, and of the state of the art, defendant's clasps were an infringement of plaintiff's patent, reissue 7,729.

In Equity. On motion for injunction.

F. P. Fish and *J. S. Van Wyck*, for plaintiffs.

E. Wetmore, for defendant.

BLATCHFORD, C. J. I am not prepared to hold, on this motion for a preliminary injunction, that the second claim of reissue No. 7,729 can, in view of the text of the specification and of the language of the claim and of the state of the art, be held to extend to anything less than the wide steel or busk marked *a*, with studs on it, placed near the edge of it,—that is, further from that side of it from which the fastening spring approaches the steels,—the fastening spring lying upon the wide steel substantially "near its center or further edge," for the purpose set forth in the text. The absence of the wide steel, in this view, from the defendant's two forms of clasp—the three steel and the four steel—makes the question of infringement so doubtful as to make it improper to grant a preliminary injunction.

The Bradford corset clasp and the Cohn corset clasp both of them have the wide steel and the other features above mentioned.

*Reported by S. Nelson White, Esq., of the New York bar.

THE LEVERSONS.

(District Court, D. Maryland. February 20, 1882.)

1. COLLISION—CONFLICT OF TESTIMONY—IMPROBABLE CASE.

Where, in a libel by the owners of a sailing-vessel against a steam-ship for damages for a collision, the testimony was in direct and irreconcilable conflict, and the testimony of the libellant's witnesses was discredited because of the improbabilities of the case attempted to be established by them, the libel was ordered dismissed.

In Admiralty.

This case having been once argued in the district court, the judge, after considering the case, directed a reargument. It was then at his request, and with the assent of counsel, reargued before both the district and circuit judges as if on appeal.

John H. Thomas, for libellants.

Brown & Brune, for respondents.

MORRIS, D. J. This libel is filed by the owners of the American schooner *David E. Wolff*, (122 tons,) against the British steamer *Leversons*, (916 tons,) to recover damages resulting from a collision in the Chesapeake bay. The schooner was bound down the bay from Baltimore to Portsmouth, Virginia, laden with 200 tons of steel rails. The steamer was proceeding up the bay on a voyage from Liverpool to Baltimore. The collision occurred between 10 and 11 o'clock at night on February 25, 1881, four miles S. E. by S. from York Spit light, the night being dark, but the atmosphere clear, and the wind a seven or eight knot breeze from the eastward. The schooner was struck on her port side, nearly at right angles, just forward of the mainmast, by the bow of the steamer, and sank immediately in water five fathoms deep. All those on board the schooner were drowned except the steward and the lookout, who were rescued from the water by boats from the steamer.

The case for the schooner, stated by the amended libel, is that the schooner was on a course S. $\frac{1}{4}$ W., with her side lights brightly burning, when those on board saw the red light of the steamer a considerable distance off over the schooner's port bow; that the schooner held her course, and the red light of the steamer continued to be visible until the steamer was about abreast of the schooner, when the green light of the steamer became visible; that immediately upon

seeing the green light hails of warning were shouted by those on the schooner; that the schooner made no effort to change her course until the steamer was in the act of striking her, when her master ordered her helm hard a-port to ease the blow, but before the order could be executed the steamer struck her port side, nearly amidship, and she sank in a few minutes.

The case for the steamer, as stated in the answer, is that she was on a course N. by E., her speed six and one-half miles an hour, in charge of a pilot, when the lookout reported a white light a point or a point and a half off the steamer's starboard bow, apparently borne by a vessel at anchor; that the pilot, upon looking at the light for a short time with a glass, discovered that it was on a vessel under way, showing no side light, and that she was changing her course and going across the steamer's bow; that thereupon he signalled to reverse the engines full speed astern, and ordered the wheel hard a-port; that at the moment of collision, which occurred very shortly afterwards, the steamer's headway was almost checked, and her bow was going off to the starboard or eastward.

The allegations of the libel and of the answer are contradictory in almost every material point, and the testimony adduced in support of each utterly irreconcilable. I have found the attempt to discover how the collision was brought about attended with more than the usual embarrassment. At the conclusion of the first hearing I was strongly inclined to take the same view of the case as at present, but a great anxiety lest by overlooking some fact, or failing properly to estimate some portion of the testimony, I might be doing injustice to men who have already been great sufferers by this disaster, caused me to hesitate. After a second hearing I find my first impressions strengthened, and I am able to adhere to them with increased confidence since the learned circuit judge, with his larger experience in dealing with such cases, has independently arrived at the same determination.

Why it is that in case of direct conflict the statements of some witnesses convince the mind, and the statements of others fail to do so, is often difficult of explanation, and in this case I shall be able to do hardly more than indicate some of the considerations which have had influence in bringing us to the conclusions I am now to announce.

It is first to be noticed that the case stated in the libel is highly improbable. It is alleged that the red light of the steamer was seen

for a considerable time off the schooner's port bow; that the schooner never changed her course; and that the steamer's red light continued to be seen until she was about abreast of the schooner. The wind was fair for the schooner—a seven or eight knot breeze—and her speed must have been about the same as that of the steamer, viz., six and one-half miles an hour. How was it possible, then, for the steamer, continuing to show her red light on the port side of the schooner until she was abreast of her, to then turn a right angle and strike the schooner a perpendicular blow amidship before the schooner passed by? These allegations of the libel were, of course, based on the statements of the schooner's steward and lookout—they being the sole survivors—and their testimony, as given in court as to the movements of the two vessels, increases rather than diminishes the difficulty of comprehending why the vessels came into collision.

The lookout of the schooner states that he first saw the steamer's red light over the port bow upwards of a mile off; that he continued to see the red light until those on the schooner began to halloo; that the red light was well off the schooner's port bow; and that when the steamer's green light opened and he saw both of the steamer's lights, she was fully abreast of the schooner, well back from the bow, where he was standing, and about opposite to the midship of the schooner.

The steward testifies that he was standing aft of the wheel and saw the red light over the port bow when it was reported, eight or ten minutes before the collision; that he continued to see the red light well on the port bow, until the steamer was about two of her lengths off and abreast of the schooner's forward rigging, when both the steamer's lights became visible to him, and suddenly her red light disappeared and the steamer struck them amidship, the steamer's stern inclining towards the stern of the schooner.

Making all possible allowances for mistakes as to time or distance, it still seems to us impossible to understand how the collision could have occurred in the manner or for the reasons given by these witnesses; and as the libellants' case rests on their testimony, it is only reasonable that, in examining other statements made by either of them, we should be quickly impressed by any improbabilities.

In the testimony of the steward he states very positively that he was standing by the binnacle just prior to the collision, and noticed the compass and the course of the schooner, which he states was S. $\frac{1}{4}$ W., with the wind E. S. E. From his answers under cross-examination it is obvious that he is ignorant of navigation and of the

points of the compass; and one wonders that although it was not at all in the line of his duty he should have observed and be able to give the schooner's course to a quarter of a point. The fact that we find on the coast-survey charts the course for a vessel proceeding southward at the point of collision marked down as S. $\frac{1}{4}$ W. must give rise to suspicion. On a sailing-vessel of that humble class, used only in the bay traffic, with 200 tons of iron in her hold, it would be remarkable to find her compass agreeing to such nicety with the course marked on the chart. And indeed if it were true that her compass did so indicate, it would be by no means conclusive evidence that such was her true course.

There is another statement made by both steward and lookout which is difficult to account for. The schooner's crew consisted of the master, mate, and two seamen, and the steward; the latter not doing duty as a seaman and not being in either watch at the time of the collision. The only men, therefore, whose duties required them to be on deck were the mate and the lookout. The collision occurred between 10 and 11 o'clock, and the watch of the master and the other seamen did not begin until 12. The night was very cold. The weather had been so cold and the upper part of the bay so full of ice that the schooner had been four days getting from Baltimore, and had gone into harbor four times in making less than 200 miles. The testimony of these two witnesses is that every man had been upon deck for a long time before the collision occurred, and they are able to give no reason for it except the steward's statement that the captain came up about half past 9, saying he could not sleep, and the lookout's suggestion that they were all up, perhaps, because they were going to anchor under Sewall's Point, which was not less than three hours distant from the place of collision. That all hands should have been on deck on such a night without having been called up by notice of danger seems very extraordinary, and to need some better explanation.

The amount of the loss in clothes and money which the steward says he sustained appears to be very unusual.

With regard to the schooner's course, while the course marked on the coast-survey charts, and given by the steward with such exactness, is the course for a vessel intending to pass out the capes, it does not appear to me that it would be the course for a vessel of small draught at the place of collision bound for Sewall's Point or Portsmouth, Virginia. It would seem more reasonable that with a fair wind she should take as direct a course as possible, and it ap-

pears from the charts that she would have sufficient depth of water on a course a little east of the Thimble light, which bears S. W. by S. from the place of collision.

Carefully and I trust fairly weighing the testimony of these two witnesses for the libellants, I find in their statements so much that seems impossible, so much that is highly improbable, that, notwithstanding their most positive and circumstantial evidence that the lights of the schooner were burning brightly, I have not been able to bring myself to think that it would be safe to find any fact as established by their uncorroborated testimony.

We come next to the testimony adduced in behalf of the owners of the steamer, and to the consideration of the question whether, even if the libellants' testimony does not account for the collision, any facts are proved which show that the steamer was in fault in not keeping out of the way and avoiding the schooner.

The pilot was a young man who had not yet obtained a full certificate to pilot vessels of over $12\frac{1}{2}$ feet draught, and he was accepted by the master of the steamer only because there was no full branch pilot on board the pilot-boat which spoke him off the capes. His capacity and acquirements are, however, fully proved by the older pilots, and they seem to have thought well enough of him to appoint him master of their own steam pilot-boat. He states that he was on the upper bridge, and that the steamer had been for half an hour on a course north by east by her compass, but as the compass varied a point to the west, her true course, and the course he intended her to be on, was due north; that after she had been on that course half an hour the lookout reported a white light ahead; that he put up his glasses and saw a vessel with a white light about a point and a half over the steamer's starboard bow and about 300 yards off; that at the first moment he supposed it was the light of a vessel at anchor, but that putting up his glasses he saw it was a vessel under sail, apparently moving in a southerly direction; that almost immediately he observed that she was changing her course so as to cross the steamer's bow; that he at once ordered the helm hard a-port and signalled by the telegraph to reverse the engines at full speed astern; that under the port helm the steamer's bow went off easterly to N. E. by N., which was her direction at the moment of collision; that just before the collision and when the port side of the schooner was towards him he saw that the dim white light which had been reported came from her cabin; that if the schooner's port light had been burning he could not have failed to have seen it.

The pilot's testimony, that the schooner was about 300 yards off, about a point and a half on the starboard bow when first seen, and that she had no side lights, is confirmed by the testimony of the lookout, the man at the wheel, the boatswain, and by the master of the steamer. Their statements as to the change in the schooner's sails differ somewhat, but not more than might be expected when it is considered that the pilot alone had the aid of glasses, and that some of these witnesses did not make out the hull and sails of the schooner until she was very close. They all agree, however, that at the moment of collision the sails were on the schooner's port side.

A further analysis of the testimony of the persons on the steamer would be useless. We have become convinced that it is from their statements that we are to gather the facts of the collision, and we find no reason to disbelieve the substantial truth of the cause they assign for it. The principal difficulty I had at the first hearing arose from the testimony introduced by the libellants to impeach the boatswain of the steamer. A number of witnesses have testified that after the steamer arrived in port the boatswain, on several occasions, made a different statement about the schooner's lights, sometimes in the presence of the lookout and the wheelsman, who did not dissent from what he said.

If what these impeaching witnesses suppose the boatswain said in the conversations they report was really what he intended to say, (which he denies,) and he said what he believed to be true, then there can be no truth in any of the testimony of the steamer's witnesses from first to last. If he did intend to say that the schooner's red light was visible, and that she did not change her course, the acceptance of these statements as true would involve the collision in so much that is unaccountable and irreconcilable, that we hardly see how we could have believed the boatswain if he had, as a witness, sworn to what is sought to be inferred from these chance conversations with him. That the boatswain had but little opportunity to carefully observe the schooner is obvious. He states that he was trimming the lamp of the pole-compass when he heard the light reported; that as he came down onto the lower bridge he saw the small white light off on the starboard bow, and he took it to be an anchor-light. At that instant, he states, he heard the bells to stop, and, taking a better look, he saw the side of a vessel, and that a collision was imminent. He sprang from the bridge to the deck and ran onto the top-gallant forecastle just in time to see the schooner cut down and her mainmast fall over the steamer's bow, driving every one off the forecastle deck. With

regard to what he is reported to have said as to the red light, I think the truth must be as stated by him in his testimony: that as he was running to get onto the forecastle he saw a red light, which was the fixed red light of the York Spit light-house, which bore about north-west, and which he then thought was a vessel's light, but that when he got up on the forecastle head he discovered its real character.

My own impressions as to the weight fairly to be given to the testimony which tends to impeach the boatswain have been much strengthened by the decided views of the circuit judge as to that branch of this case.

Counsel for the schooner have urged that even if it were true that the schooner's side lights were not visible, that her sails and hull might have been seen at a distance sufficient to have enabled the steamer to make out her course and avoid getting so close to her. The night was dark, with a clear atmosphere; and the testimony of experts shows that on such a night a vessel without lights should be seen with the naked eye from 300 to 400 yards off. The distance would, of course, vary with the size of the vessel and the spread of her sails. This schooner was almost of the smallest class, and when approaching the steamer her sails were rather flat aft. The testimony of those on the schooner shows that she was discovered at the distance at which she might reasonably be expected to be seen by an attentive lookout. It is, however, suggested that had the pilot more diligently employed his glasses in searching for lights ahead, he might have discovered the schooner before she was reported by the lookout. It seems to me, however, that the special use of the glasses is rather to more clearly discover the character of an object that has been already discovered. At all events, I do not think that an ordinary steamer, running at a moderate speed in a bay over 10 miles wide, should be condemned for having failed to discover a sailing-vessel without lights merely because there is a possibility that if the officer or pilot in command had been constantly sweeping the horizon with a good pair of glasses, the vessel, even without lights, might have been seen in time to avoid her. In our judgment the steamer has been shown not to have been in fault, and the libel must be dismissed.

NOTE. Where there is a great conflict of testimony the court must be governed chiefly by undeniable and leading facts, if such exist. *The Hope*, 4 FED. REP. 89; *The Great Republic*, 23 Wall. 20. And where a witness, otherwise unimpeached, testifies to that which, in its nature, is incredible, his testimony is not necessarily to be believed. *United States v. Borger*, 7 FED. REP. 193; *The Helen R. Cooper*, 7 Blatchf. 378.—[Ed.]

THE D. M. ANTHONY. (Four Cases.)

(District Court, S. D. New York. February 3, 1882.)

1. COLLISION—SAILING-VESEL—TUG AND TOW.

Where a tug with boats in tow, lashed upon each side of her, being in all 130 feet wide, was proceeding up New York bay at about two knots an hour, and the schooner D. M. A. came up from behind upon a course about north by east, at the rate of six to seven knots per hour, and was sailing close-hauled by the wind, which was about north-west, but variable, and approached the center of the tow to within 200 yards and headed nearly directly upon the tow, and designed to go to windward, but, being unable to do so, ported her helm in order to go to leeward, and in so doing came into collision with the stern of the tow, sinking some of the boats and injuring others, *held*, upon contradictory evidence, that the facts were as above stated, and that the schooner was alone in fault in coming too near to the tow before properly shaping her course to avoid it.

In Admiralty.

Beebe, Wilcox & Hobbs, for libellants Malloy & Donovan.

J. A. Hyland, for libellants Thompson & Herbert.

Owen & Gray, for claimants.

BROWN, D. J. These libels were filed to recover damages growing out of a collision on the twenty-third day of November, 1880, arising from the schooner D. M. Anthony running into the stern of the tow of the steam-tug David C. Cox. The steam-tug left Port Johnson at about 7 A. M. with a tow consisting of three canal-boats loaded with coal lashed to her starboard side, and two lashed to her port side, bound for the East river. The tow projected somewhat astern of the tug. After rounding the buoy to the south of Robbins Reef light she had straightened up on her course, heading for the battery, and had got about one-third the distance to Bedloe's island, when the D. M. Anthony, coming up from behind, intended to pass on the port side, but changed her course when about twice her length astern of the tug and attempted to pass to starboard. In making this attempt she ran in between the sterns of the two outside boats of the tow, on the starboard side, sinking them almost immediately, and injuring the boat next to the tug. These libels are filed by the owners of the boats, cargo, and other personal effects lost or injured by the collision; two of the libels being against the D. M. Anthony alone, and two being against both the schooner and the tug, and charging both with fault.

The collision was at 9 o'clock in the morning, in clear weather, under a fair wind, in ample sea-room, and without any obstruction

to navigation. It could only have occurred, therefore, from some inexcusable carelessness of one or both vessels. The tug was proceeding slowly, encumbered by an unwieldy tow; the schooner was following more rapidly, in nearly the same course, and with a broad space for navigation. It is conceded that it was the duty of the tug to keep her course, and the duty of the schooner to keep out of the way. The only defence of the schooner is that when she had approached to within about 100 yards of the tug, the latter suddenly put her helm to starboard, thus going to port and directly in the way of the schooner's course; that the schooner, upon the course she had been pursuing, would, but for this change by the tug, have gone clear by some 25 or 50 yards on the port side; that this change by the tug necessitated the schooner's attempt to pass to starboard, which was unsuccessful; and that the whole fault was therefore on the tug. On the part of the tug it is asserted that she made no change of course whatever, and that the sole fault is in the schooner.

The D. M. Anthony was a three-masted schooner, about 125 feet in length. The night previous she had anchored near Sandy Hook, and on the morning of the 23d was proceeding up the bay, bound for Hoboken, on the North river. From the Narrows her ordinary course would be N. by E. $\frac{1}{2}$ E., and the answer alleges that she kept steadily on her course. The ordinary course of the tug, after rounding the Robbins Reef buoy, would be N. E., and there was no reason for her to vary from it. The wind, according to all the witnesses from the schooner, was variable, from N. W. to W. N. W.; she was sailing by the wind, close-hauled, upon her port tack; and as, by their testimony, she could keep within four points of the wind, she could easily have made, from the Narrows, her desired course of N. by E. $\frac{1}{2}$ E.

According to the testimony of those on the tug and tow the wind was variable from N. W. to N. N. W., and the schooner was sailing free just prior to the collision. The captain testified that at half past 8, when in the Narrows close to the easterly shore, he saw the tug some two or three miles off, upon his port bow, heading a little across his course to the eastward; that his instructions to the wheelman were to sail by the wind, which was done; that as he approached the tug these instructions were repeated, directing the schooner to be kept close to the wind and "close at it," in order to pass to windward, and that he would have gone clear but for the change in the course of the tug to port when two or three lengths distant; that he

saw the pilot of the tug make this change of his wheel, and that he thereupon ported his helm and let go the spanker, so as if possible to pass to leeward, and that the collision occurred just as the schooner began to pay off; that she was making about three knots per hour, and the tug about two and one-half knots. The mate and wheelsman testify to the same effect; and all on board say that the schooner was making only about three knots. The captain also says that when passing Robbins Reef light he was about one and one-half miles to the east of it, over towards the Long Island shore. The mate testified that he was acting as lookout; that he had given directions in regard to the sails; that just prior to the collision he had been walking fore and aft to keep warm; that the schooner, sailing close-hauled, would not come into stays in less than 300 yards, nor pay off much in less than 200 yards. One of the hands testified that when within about two or three lengths of the tug he could see clear under the stern of the tow on the port side.

On the part of the tug it was testified by the pilot and engineer that there was no change of course, and no change of the wheel except such as was necessary to keep the tug straight upon her course. The pilot said that he saw the schooner in the Narrows nearly astern; that he did not notice her again until about two or three lengths off, when he turned around and saw her nearly directly astern, and coming directly upon him; that he blew several blasts of the whistle twice. These blasts were recognized by several persons on the tow as signals of danger, and their attention thereby immediately directed to the schooner. They all say that the schooner was then two or three lengths off; that she was almost directly astern of the tug, a little to starboard, and coming nearly directly upon them. Those on the starboard boats testify they could see most of her starboard bow; a witness on the extreme port boat said he could see most of her port bow. The lookout on the tug says the schooner was at this time a little off his starboard quarter, coming straight upon them. The captain, mate, and wheelsman of the schooner do not, on the whole, contradict this statement, but rather confirm it. The captain says that the tug, at the time her course was changed, was right ahead of him; he saw two of the boats on the starboard bow, and one on the port. The mate says when they got close up, pretty near, she was right straight ahead, and that they were "heading pretty near right ahead onto her;" could see some of her boats on each bow. Drowne, the man at the wheel, says the tug was at that time about

a point off his port bow, and that he could see her boats over each bow. Two deck hands say the same.

From this testimony it is plain that, before adopting a course giving a sufficient margin for passing the tug and tow in safety, the schooner had approached them to within about 100 yards, somewhat to the starboard of the tug herself, and heading nearly directly upon her. I am satisfied that this near approach of the schooner in that position, and on the course she was pursuing, was the primary and sole cause of the collision. According to the testimony of her own witnesses she was sailing by the wind; the wind was variable and she was close-hauled; the tug and tow were about 130 feet wide, and if she could not come into stays short of 300 yards, as her mate testifies, such near approach to the tug and bearing directly upon her was hazardous and unjustifiable. The tow presented so much breadth in front of her that at the distance of 100 yards the schooner must have followed a course at least two points nearer the wind than the tug in order to go clear to windward; and if she were already close-hauled and sailing by the wind, as her witnesses say, she could not have luffed so much without coming nearly into stays, which her mate says would take 300 yards.

The very evident and egregious mistakes, to say the least, made by those on the schooner in their testimony as to her rate of speed, in which they all agree, detracts much from the weight to be given to their testimony in other respects. The tug was going but about two knots per hour, and had the schooner been going but three knots, as they all say, the collision could not have happened anywhere in the neighborhood of where it occurred, nor, in fact, could it have happened at all. For the tug was seen from the schooner at half past 8 o'clock, says the mate, at 8:15, says the captain, some three miles off, when the schooner was in the Narrows; and the schooner, if she was sailing at the rate of three knots an hour only, could not have overtaken the tug until she had passed the Battery; whereas the collision was some three miles below it. As the collision was between one and two miles below Bedloe's island, and took place, as the mate testified, when it was just 9 by their clock, the schooner had reached this point from the Narrows in from half to three quarters of an hour, and the distance is very nearly four miles. The schooner was, therefore, going from six to seven knots per hour. The tug had left Port Johnson at 7, and had made four miles at the time of the collision, or two knots per hour. The witnesses from the tug said there was an eight-knot breeze; and, as the tide was ebb,

the progress of the schooner would show that they were not far from correct in this estimate.

The statement of the captain, that when he passed Robbins Reef light he was a mile and a half to the eastward of it and over towards the Long Island shore, would be of some importance, if true, as indicating the course of the schooner in reaching the place of collision, the large westward divergance of her course from that of the tug, and the consequent reasonable expectation of passing to windward. But this statement is utterly incompatible with the answer, and with all the other testimony in the case. To reach a point so far to the east of the light would require her course to be about N. N. E. from the Narrows, and a change to nearly N. W., in order to reach the place of collision,—a change of nearly six points. The last course was nearer the wind than she could possibly have sailed, being nearly directly into the wind, and wholly off her course for Hoboken.

There is no reason to suppose that the schooner did not come up from the Narrows upon her natural course without any other changes than arose from the variable wind. This course was N. by E., and as she sailed by the wind close-hauled the wind was probably varying as much to the north of N. W. as to the west of it. Nor would she otherwise have been nearly following the course of the tug, as it appears she was, when within 100 yards of her.

The statement of the captain and others on the schooner that they saw the man in the pilot-house of the tug starboard his helm when 100 yards distant, is, I think, incorrect. The smoke-stack was directly behind the pilot-house and within a few inches of it, and it obscured any correct observation of the man at the wheel from behind; nor at the distance of 100 yards astern could his motions be correctly observed from the side without placing the schooner much further on the starboard side of the tug than her own witnesses state, and further even than I find the proof on the part of the tug to warrant. The ordinary movements of the pilot in keeping the tug steady might also be easily mistaken. The force of the collision upon the starboard side would naturally turn, and did turn, the whole tow around to port, and this change is, I have no doubt, what was in the minds of the witnesses, and what they have misplaced in time as occurring just before the collision.

Those on board the tug emphatically deny any change of course prior to the collision. It also appears that no considerable change of course of a tug and tow so cumbersome and going so slowly could be made short of 10 minutes. The change of course alleged is a

change by starboarding the helm when only 100 yards ahead of the schooner. Now this distance must have been made by the schooner, at the rate she was sailing, in less than a minute—a time too short to admit of any appreciable change in the tug's course, even had her helm been starboarded as alleged; while the impact of the schooner at the moment of collision, right between the sterns of the two starboard boats, shows that there could not have been much, if any, change in the course of the outer boats of the tow which would have exhibited such a change, at the most, if there had been any change.

The statements in two of the libels that the tug did change her course was sought to be corrected by those libellants on the hearing. Their own evidence is doubtless much weakened by this variation in their statements. But the errors of these libellants are not attributable to the tug, and are no estoppel upon her defence in these two libels in which she is joined as a defendant. I am satisfied that the tug did not contribute to the collision by any fault on her part.

In the two cases of Malloy & Donovan against the D. M. Anthony alone, decrees will be entered with costs; in the two cases of Thompson & Herbert against the schooner and the tug, the libels will be dismissed with costs as respects the tug, and decrees with costs will be entered against the schooner.

A reference will be made in each case to compute the damages.

THE VIGILANT.

(*District Court, E. D. New York. February 3, 1882.*)

1 TUG—LIABLE FOR LOSS OF TOW.

Where a canal-boat in tow was stranded by the negligence of the tug having her in tow, and in consequence of a depression or hole in the surface of the bar on which she was grounded a part of her bottom fell out at the receding of the tide, *held*, that the tug was liable for the damage.

J. A. Hyland, for libellant.

O. B. Payne, for respondent.

BENEDICT, D. J. This action arose out of the following circumstances: On the eleventh day of November, 1880, the steam-tug Vigilant undertook to tow the canal-boat H. G. Baker, laden with coal, up Glen Cove creek. While being so towed the canal-boat was stranded on a bar that ran along the channel in one part of the creek,

and was then left. Before she could be got off the bar her bottom broke out at a point on the port side, and she filled. This action is brought against the tug to recover the loss sustained by the owner of the canal-boat by reason of this disaster.

The first question presented is whether the stranding of the canal-boat upon the bar was caused by negligence on the part of the tug. Upon this question my conclusion is that it was so caused. It is no answer for the tug to say that the canal-boat was with difficulty kept in the channel, because the two towing hawsers were of unequal length, owing to the absence of a cleat on one side of the canal-boat. The pilot of the tug knew when he commenced to tow the canal-boat how the hawsers were fastened, and if they were so made fast as to be in fact of unequal length, he became chargeable with the duty of exercising sufficient care and skill to keep the boat in channel in spite of any difficulty created by the method in which the hawsers were made fast.

The stranding of the canal-boat being found to have been caused by negligence on the part of the tug, the next question presented by the testimony is whether the injuries sustained by the canal-boat while on the bar are to be attributed to the stranding, or to the old and rotten condition of the boat. Here the contention on the part of the tug is that the canal-boat was not injured by striking the bar; that the character of the bar was such that the boat, if seaworthy, could have lain upon it for a long time without injury; and that the breaking down of the boat's bottom was owing solely to her unseaworthy condition. On the other hand, it is contended in behalf of the canal-boat that the boat was seaworthy, and that the stranding occurred at a place where there was a depression or hole of considerable dimensions in the surface of the bar over which the boat grounded, and into which, she being loaded, a part of her bottom fell when the tide went out, because deprived at that point of any support, either of land or water. Upon this issue the burden is upon the tug. Having negligently stranded the canal-boat she must pay for the injuries sustained by the boat while so stranded, unless she can make it clear that such injuries would not have been sustained if the canal-boat had been seaworthy.

Upon the evidence there can be no doubt that the bottom of the canal-boat gave way, at a point where it was left without support, because of a hole or depression in the bar over which the boat grounded, and the evidence warrants the inference that the bottom would not have given way if it had not been for this hole. Much

conflicting testimony has been given in regard to the condition of the boat's bottom, but the weight of it, as I think, warrants the conclusion that the boat's bottom was strong enough to have supported the cargo in safety if it had not been for the existence of the hole or depression in the bar across which the boat lay. The direct evidence upon this point is confirmed by the undisputed fact that a short time before this the boat lay in safety aground at Thorne's wharf, a place, according to the claimant's witnesses, more trying to a canal-boat than the bar on which she stranded, and that on this occasion she was expecting to lie at the same wharf. My conclusion, therefore, is that the injuries sustained by the boat arose from the character of the bottom where she stranded, and not from her unseaworthy condition.

A question has been made as to the cause of the hole in the bar, and witnesses have been called in behalf of the tug who express the opinion that the depression into which the boat's bottom fell was caused by water running out of the boat when the tide went out, and washing away the soft bottom underneath. But this view rests solely upon opinion. No witness is called who says that he saw the making of the hole, nor does any witness testify that there was no such hole in the bar when the boat grounded. On the contrary, the master of the canal-boat testifies that as soon as the tug left him he felt around his boat with a pole to see what bottom he was on, and then found this hole, and at once jumped into a boat to inform his consignee that the boat would fill upon the bar; and he further testifies that when, shortly after, he returned to the boat with the consignee, the bottom had burst over the hole in the bar. In this the master is corroborated by the consignee, who, being called by the claimant, says he was there on the 11th, and saw the hole and a timber broken down over it. It does not appear to be very probable that such a hole could be made in so short a time by water running out of the boat. And, besides, there is a failure of evidence to show that there was any considerable amount of water in the boat. The opinions of the claimant's witnesses do, however, show that it is not improbable that such a hole might have been made in the bar by currents, tides, or even passing vessels, and renders credible the positive testimony of the master of the canal-boat that the hole was there when he grounded. I am unable, therefore, to find that the hole in the bar is attributable to water running out of the canal-boat.

But if the fact be that soon after the canal-boat grounded water ran out of her in sufficient quantity to make the hole in the bar where the

bottom broke down, then, inasmuch as the evidence is that there was scarcely any water in the canal-boat at the time she took the bottom, the inference follows that the water which made the hole in the bar by running out of the boat, was caused by a leak created by the stranding; and such inference is in harmony with the testimony in regard to the situation of the boat when left by the tug, as such a situation might easily cause the boat to leak. In either case the liability of the tug would be the same.

For these reasons my determination is that the libellant is entitled to a decree against the tug for the amount of the loss in question, to be determined by a reference in the usual manner.

CITIZENS' INS. CO. *v.* KOUNTZ LINE.*

(District Court E. D. Louisiana. February 20, 1882.)

1. COMMON AGENT—JOINT LIABILITY OF CARRIERS.

Where several boats are severally owned by different corporations, and are all run, each for its own account, in one "line," which line is itself another corporation, and all the corporations are represented by the same person as agent, who signs bills of lading for goods shipped upon one of the boats as agent for the "line," *held*, that said agent was a common agent for all, but in his representative capacity acted separately for each, and that hence there was no joint interest and no joint liability, and for goods shipped by one boat the owners of the other boats could not be held liable, as *they* did not undertake the safe carriage thereof.

2. AGENT—POWER TO BIND PRINCIPAL.

An agent, though he have power to transact the joint business of many, cannot therefore bind one of his principals in the separate business of another principal.

O. B. Sansum and John A. Campbell, for libellants.

Chas. B. Singleton and Richard H. Browne, and *Geo. H. Shields*, for defendants.

BILLINGS, D. J. This suit is brought to recover upon bills of lading for goods shipped upon the steamer H. C. Yaeger. The goods were shipped from St. Louis to New Orleans and other points upon the Mississippi river, and were laden upon the Yaeger, which, with her entire cargo, was lost when out from St. Louis about 30 hours. The libellants were insurers of the cargo, have paid the loss, and bring this action as subrogees of the insured, the parties named in the bills of

*Reported by Joseph P. Horner, Esq., of the New Orleans bar.

lading. The suit was commenced by attachment, none of the defendants having been found within the district. The bills of lading are for goods shipped by the steamer H. C. Yaeger, and were signed by "J. W. King, agent Kountz line, St. Louis." The defendants, whose property has been attached, are several of five corporations, and the question submitted with reference to this part of the case is, were these five corporations jointly bound by these bills of lading thus issued by King as agent of the Kountz line?

The evidence shows that the Kountz line had been in existence about nine years. It is a corporation established under the laws of Missouri "to receive and forward merchandise and products, and for the purpose of transportation upon the Mississippi river and its tributaries." At the time of its incorporation four boats were corporators or stockholders, but shortly afterwards five separate corporations were formed under the same law of Missouri, also for the purpose of transportation on the Mississippi river and its tributaries. The boats ceased to be stockholders in the Kountz line, the new corporations were called by the name of the several boats, and the title to each boat was transferred to the corporation which bore its name. These five boats constituted a line of steamers running at regular intervals and under one management, and were known as the Kountz line steamers. There was not a complete identity of interest on the part of the Kountz line and the several boat corporations. There were different stockholders, though to a large extent the stock was held by the same persons and in the same proportions. In two of the boat corporations a great majority of the stock was held by the daughters of Com. Kountz. He was the president, and J. W. King was secretary, of the Kountz line, and of all the boat corporations. The corporations were all domiciled at St. Louis, and had the same place of business, which was transacted at the office of the Kountz line under the direction of Com. Kountz, and either by him or King as the agents of the Kountz line.

The Kountz line received all the money earned by each boat at St. Louis, and all that was collected by the agents at New Orleans was forwarded by draft to the Kountz line at St. Louis. The purchases of merchandise for any of the boats, in order to make out a cargo, were made by the Kountz line, were billed to and paid for by it. The Kountz line, by J. W. King, agent, advertised, through circulars and hand-bills widely distributed, that the Kountz line boats were superior to their competitors in their construction, in their prompt

compliance with their bills of lading, and in their rate of charges for freight. One advertisement in an Allegheny newspaper was offered in evidence, in which the Mollie Moore, one of the steamers attached, is announced as forming, with the Yaeger and three other steamers, the Kountz line steamers, running from St. Louis to New Orleans, from the Kountz line wharf-boat, St. Louis, and the public were invited to apply for further information to "John W. King, Kountz line wharf-boat, St. Louis, Mo.;" "C. L. Brennan, Kountz line office, 106 Gravier street, New Orleans;" "or to W. J. Kountz, Allegheny, Pa."

But the evidence establishes that the accounts of each of these boats were kept upon the books of the Kountz line separately, and that in these accounts each boat was credited with all its own earnings, after deducting \$150 as the charge of the Kountz line for each trip; that each boat was charged with the price of goods purchased for and forwarded by it, and was separately credited with the proceeds of all the goods carried by it when sold. The evidence also shows that in two of these boat corporations a dividend had been declared, and that in case of one of these boats the corporation which owned it, out of its earnings, had built a second boat, which it continued to own, and which also ran under the management of the Kountz line.

The question presented is whether the bills of lading issued by King, agent of the Kountz line, for goods shipped by the Yaeger, bound the owners of the Yaeger alone, or whether they bound the owners of all the boats which ran in or constituted the Kountz line steamers.

These bills of lading were issued by the "agent of the Kountz line," *i. e.*, by the Kountz line, and the question is whether the relations of the boats were such, either when viewed as actually existing or when considered as they were held out to the public as existing, as to make the bill of lading issued for one boat the act of the owners of all the boats which were operated by a common agent, and were so connected that they constituted one line.

The questions as to the joint liability of carriers for the acts of a common agent has most frequently arisen with reference to transportation over connected lines, but in principle the question is the same where the owners, having a single agent, represent, not different sections of a continuous route, but different vehicles traversing the same route. The cases with reference to this question divide themselves into three classes:

1. Where there is a sharing of the profits or earnings of each section among the owners of all the sections. Here, upon the same equity which establishes the liability of individuals in partnerships, all the owners are bound by the acts of the agent as to the part of any owner. An illustration of this class is found in the case of *Champion v. Bostwick*, where both in the supreme court of New York (11 Wend. 571) and in the court of errors (18 Wend. 175) the liability of the owners of all the parts of a route for a negligence upon one part was maintained, because all shared in the profits of the entire route.

2. Where, without any sharing of earnings, the common agent, having authority to bind the owners of each part to carry over the entire route, exercises that authority, and there is a default upon any part of the route. Here all are bound, because all have agreed to be bound. An example of this class is found in *Fairchild v. Slocum*, 19 Wend. 329, afterwards affirmed by the court of errors, 7 Hill, 292.

3. Where, without any sharing of earnings, the owners of the various sections of a route have a common agent, but in his representative capacity he acts separately for each. In this class of cases, since there is no joint interest and no joint agency, there can be no joint liability, and the owner of each section of the route is bound with reference to transportation over his own section only; for an agent, though he have power to transact the separate business of many, cannot, therefore, bind one of his principals in the separate business of another principal. This class of cases is illustrated by *Briggs v. Vanderbilt*, 19 Barb. 222, and *Bonsted v. Vanderbilt*, 21 Barb. 26. Into this class also falls the case of *St. Louis Ins. Co. v. St. Louis, etc., R. Co.* 13 Cent. Law J. 468, where the supreme court holds that connecting lines having a common agent—each bearing its own general expenses and the expenses of every transportation over it, and each being paid according to its comparative length—had no participation in each others' earnings, no relation or association in the nature of a partnership, so that the case did not fall within the first class; and, further, that in such a case there was no holding out of authority to contract for the various constituents of the entire route save from each section for itself.

It must be borne in mind that the case now presented to the court for decision is not a suit in equity in which, by a creditor's bill, it is sought to reach property standing in the name of others, but alleged in equity to be the property of William J. Kountz; but that the allegations of the libel present solely the question: Did these five corpora-

tions jointly undertake by these bills of lading for the safe carriage of the goods shipped by the H. C. Yaeger?

The evidence of W. J. Kountz, of John W. King, and of Rogers, is to the effect that the accounts of each of the boats running in the Kountz line were kept separate and distinct; that each was charged \$150 by the Kountz line for its services for every trip; that after deducting this sum from its own moneys each boat was credited with its earnings and charged with its expenses. There was, therefore, a combining of boats to form a common line, but there was no distribution of earnings—no sharing in any common fund—and there was no connection in the nature of a partnership which would bring the case within the first class. Does it fall within the second class? The material facts are that five corporations, each owning a steam-boat, combine to run under one management—in place of departure and destination, in the intervals at which they run, and in their rates of freight—to form a single line, which they called the Kountz line. They have a common agent—the incorporated Kountz line—but it acts for each boat separately. They do not establish jointly any agency for all, but each adopts the same agent for itself. Here the agent, with reference to each boat, acts for that boat alone, and binds no one else, and falls within the third class, where there is a common agent, but no participation in earnings and no joint agent.

This case is indistinguishable from the cases of *Briggs v. Vanderbilt* and *Bonsted v. Vanderbilt*, 19 and 21 Barb. These cases were well considered. They spring out of precisely similar facts, and should be read together. The first is a decision of the general term of the supreme court of the Kings county district, and the second a decision of the general term of the supreme court of Albany county. The first was pronounced by Judge Selah B. Strong, for some 16 years judge of the supreme court, afterwards judge of the court of appeals. The second was rendered through Judge Amasa J. Parker. Both these courts were composed of eminent judges. In these cases three companies, one running across the isthmus, one on the Atlantic, and one on the Pacific side, combined and formed what they denominated "Vanderbilt's new line between New York and San Francisco." In their advertisement they announce that the steam-ships running therein were built expressly for that route. They had the same management and places of business both in New York and San Francisco. They advertised to carry passengers through. They advertised and transacted their business through a common agent. The contract was for a through passage, but for each portion of the route separate

tickets were given, all headed "Vanderbilt line," and signed by D. B. Allen, agent, who was the common agent. The proof also showed that there was no joint interest in the passage money, and no agreement for its division. The court held that there was no *joint agency*. Judge Strong says, (19 Barb. 238 :) "They [the defendants, the several lines,] had, it is true, the same agent, but he acted in his vicarious capacity separately for each." Judge Parker (21 Barb. 30,) says: "Allen sold the plaintiff three tickets, and sold each as the agent of the owner of one part of the line."

I confess I have found great difficulty in solving the question so as to make a decision which should be in harmony, on the one hand, with the rule as laid down by Chief Justice Tindal in *Fox v. Clifton*, 6 Bing. 240, as to the doctrine of liability springing from holding out one's self as partner, as contradistinguished from the actual relationship of partnership, and the long line of cases in which that rule has been followed; and, on the other hand, with the well-considered cases in which the doctrine of holding out as having the relation of partner is applied to connected lines of carriers. It is clear that the latter cases have modified the general doctrine of implication in its application to connected lines. This is in consequence of the impossibility of conducting the ramified business of transporting our vast commerce over our continent without permitting the announcement of connections in routes which must be understood to be mere conjunctions as to time and place, and not the assumption or distribution of liability. Taking the doctrine of implied liability as it has been announced by the courts whose adjudications should be held the most binding, in its application to carriers who have combined in the formation of continuous routes, I feel sure the bills of lading sued on in this case created an obligation on the part of the owners of the Yeager alone, and that the libellants have failed to establish any joint contract, or any such holding out as would bind the corporations who are the defendants. Without deciding any of the other questions presented in the cause, I am of opinion, therefore, that the libel must be dismissed.

A CARGO OF MALT.

(District Court, S. D. New York. November 10, 1881.)

L. ORAL CONTRACT—CHANGE IN—NOTICE TO BE GIVEN.

Where an oral contract was entered into by the libellant, who agreed to take on his canal-boat a cargo of malt, and hold and transport the same at the rate of five dollars per day for 30 days, and if at the end of 30 days the cargo was still on board, from that time the libellant should be paid the "going rates" until the cargo was removed, it was *held* that the latter stipulation was an essential part of the contract, and that the owner of the cargo was entitled to specific notice of a change in the contract at the expiration of that time, and to be required to remove the cargo or pay the new rates.

In Admiralty.

E. D. McCarthy and *Mr. Elliot*, for libellant.

Carpenter & Mosher, for respondents.

BROWN, D. J. This libel was filed to recover a balance alleged to be due for taking on board, holding, and transporting a cargo of malt upon a canal-boat of the libellant.

The oral contract, under which the cargo was taken on board, was made by the libellant with Mr. Ramsay, the agent of the claimant. Both substantially agree as to the terms of the contract, which were that the libellant would take the cargo aboard his boat, and allow the claimant the use of her, for which the libellant was to be paid at the rate of five dollars per day for the first 30 days, which period of use Mr. Ramsay guaranteed; and if, at the end of 30 days, the cargo was still on board, that from that time the libellant should be paid the "going rates" until the cargo was removed.

Under this contract the cargo was taken aboard at Newark on October 10, 1879. At the end of 30 days, on November 10th, the libellant called at the office of the claimant, received \$150 for the 30 days, and then told Mr. Ramsay that "they were now paying \$10 per day, and that he wanted that for the further use of his boat;" to which Mr. Ramsay replied, "If that is the going rate, you will get it." The libellant also testified that about a week afterwards he called at the office of the claimant, Mr. Gray, and told him, substantially, the same, to which, he says, Mr. Gray did not reply. Mr. Gray testified that he had no recollection of any such interview, and that at the time stated he was not in New York, but in Buffalo. The cargo was ordered and taken to Brooklyn in December, where it was discharged from the ninth to twelfth of that month. The libellant claimed \$10 per day after November 10th, and payment at that rate being refused, he filed this libel on the tenth of December, 1879.

It was proved that by "going rates" is meant the rates as established and paid by the three railroad companies most largely engaged in the lightering of grain, viz., the Pennsylvania, the New York Central, and the Erie Railroad companies; and these companies were mentioned and referred to in the origi-

nal contract. The representatives of these companies fix the rates from time to time according to the supply and demand for boats of the ordinary size carrying from 8,000 to 8,500 bushels. By these rates there would have been owing to the libellant \$47, or a little less, and that amount was tendered to him before his libel was filed. The representative of the Erie Railroad Company testified that when boats were scarce a higher price was allowed for boats carrying 10,000 bushels or over, but otherwise no distinction was made for extra size; and that from November 8th to 11th he paid \$10 for such boats. The other companies had not paid for any boats higher than from \$3 to \$8 during the whole period, but whether they actually had larger boats at the time does not appear.

The libellant's boat was, as I must find, upon the testimony, of extra size, for which he is entitled to \$10 for November 10th and 11th, which will entitle him to \$51, instead of the \$47 tendered. The libellant's claim to the benefit of a new contract at the absolute rate of \$10 per day after November 10th cannot be sustained. The original contract was an entire contract. It embraced three principal points: *First*, the rate of five dollars per day for 30 days; *second*, the guaranty by the claimant of 30 days' pay, whether the cargo was unloaded before that time or not; *third*, the privilege to the claimant after 30 days, in case the malt was still aboard, to continue the use of the boat at the "going rates" of the three companies named. The privilege for the use of the boat after 30 days at "going rates" is as clearly embraced in the original contract as the guaranty of 30 days' pay whether used the whole time or not. There is nothing unreasonable, unfair, or improbable in such an agreement. Having a guaranty of 30 days at a fixed price, there is certainly nothing unreasonable in the libellant agreeing to receive the current rates thereafter; and it would be unreasonable to subject the cargo to the alternative of an immediate transfer after 30 days, or to the payment of arbitrary and excessive rates, unless the contract plainly gave to the libellant that right. The original contract in this case does not do so, and to allow the libellant, at the moment the 30 days expired, to fix an arbitrary price for any continued use of his boat, would be equivalent to disregarding altogether the express stipulation for the further use of the boat at "going rates." The stipulation being an essential part of the original contract, the libellant had no legal right to vary it.

Nor was the notice given by the libellant on November 10th of the character required to change the contract, if he had had a right to change it. The language of this notice imported no more than that \$10 was the "going rates," and that the libellant would accordingly

expect that rate of payment. That was no more than directing attention to the original contract,—an act of caution on the part of the libellant, as the rates were then much higher than \$5 per day. Mr. Ramsay's answer was but a renewed assent to the original contract. Had the libellant intended to reject the old contract or to impose a new one at higher rates, or had he any right to require the removal of the cargo unless some new terms of payment were agreed on, he was bound to give intelligible notice of such an intention, and plainly to require removal of the cargo or payment of new rates. He gave no such notice and expressed no such intention. The original contract, therefore, remained, and he can recover according to the terms of the original contract only.

Although I have allowed a sum slightly above the amount tendered, in consequence of the extra size of the libellant's boat, the libellant is not, I think, entitled to recover costs, because he did not, at the time of demanding payment, make any claim upon that ground, and because, having gone with Mr. Ramsay to the representative of the Pennsylvania Railroad Company and heard the "going rates" paid by that company for the period, he refused to go to the office of the Erie Railroad Company, where alone the extra rate had been paid, and where alone that fact would have been ascertained. He claimed \$10 per day for the whole period as upon a new contract, to which he was not entitled and which is here disallowed.

Decree for \$51, and interest from December 6, 1879, without costs.

THE HENRY CHAPEL.

(District Court, D. Massachusetts. February 22, 1882.)

1. ADMIRALTY—DAMAGES FOR NEGLIGENT TOWAGE.

A tug undertaking to tow a vessel in navigable waters is bound to know the proper and accustomed water-ways and channels, the depth of the water, and the nature and formation of the bottom, whether in its natural state or as changed by permanent excavations, and is responsible for any neglect to observe and be guided by these conditions.

2. SAME—NOTICE OF DANGER—RESPONSIBILITY.

Where one of the proprietors of the wharf to which the schooner was being towed, and who was also one of the owners of the cargo, neglected to caution the tug of the danger, such neglect will not render the schooner responsible, he being neither owner, charterer, nor agent of the schooner.

Libel filed by the owner of the schooner Ann S. Brown against the steam-tug Henry Chapel, to recover for injuries alleged to have been caused by negligent towage.

C. T. & T. H. Russell, for libellant.

Hale & Walcott, for claimant.

NELSON, D. J. Smith's coal wharf in Cambridgeport is built on the northerly side of Charles river, and is separated from the main channel of the river by wide flats, bare at low water. The wharf is connected with the main channel by a dug-out channel, extending across the flats, and in front of the wharf the bottom has been dredged out, so that vessels with a draught of 11 feet can come to the wharf at high water. The dredging in front extends out some distance from the wharf, forming a basin with sloping sides, and in this space it is customary for coal vessels to lie when waiting their turn to unload. The usual and proper course to approach the wharf is to cross the basin midway until near the junction of Smith's wharf with Bent's wharf, which adjoins it on the west, and then to turn westward. Upon this course the depth of the water at high tide is sufficient to float a vessel with a draught of 11 feet, and the bottom is even and uniform, so that vessels can there lie with safety when left aground at low tide.

The schooner Ann S. Brown arrived in Boston, May 27, 1881, from New York, having on board a cargo of 295 tons of coal, to be delivered at Smith's wharf. Having passed the bridges, and anchored above West Boston bridge, she engaged the tug-boat Henry Chapel to tow her up to the wharf. This service the tug undertook to perform on the afternoon of June 3d, at high water. The draught of the schooner,

as loaded, was nine feet and eight inches forward, and 10 feet aft. Another vessel was then discharging at the wharf, and it was arranged that the tug should leave the schooner in the basin, near enough to the wharf to be reached by a line, by which she could be drawn in at a later tide. Instead of following the usual course for approaching the wharf, the tug, with her tow, passed so far to the westward of it that the bow of the schooner grounded on the westerly slope of the basin, and there stuck fast. As the tide receded she settled unevenly, her bottom, from the mainmast forward, resting on the hard gravel of the slope, and her stern in the soft mud of the basin. The result was that she was more or less strained.

The regular business of the tug was towing on Charles river, and the master, who is also the owner and claimant in this suit, had frequently before this towed vessels to Smith's wharf.

It seems to me very clear that this state of facts discloses a case of negligence on the part of the tug for which she should be held responsible. The rule of law is perfectly well settled that a tug undertaking to tow a vessel in navigable waters is bound to know the proper and accustomed water-ways and channels, the depth of water, and the nature and formation of the bottom, whether in its natural state, or as changed by permanent excavations. When all these conditions, as they exist, admit of safe towage, the tug is responsible for any neglect to observe and be guided by them. *The Margaret*, 94 U. S. 494; *The Effie J. Simmons*, 6 FED. REP. 639. In this case, if the vessel had been towed in the usual course for approaching the wharf, she would have rested, as the tide receded, evenly and equally on the whole length of her bottom, and would have suffered no strain. For her failure in this particular the tug should be held liable for the resulting damage.

It appears that the proprietors of the wharf were also the owners of the cargo of coal, and that one of them was standing on the wharf when the vessel was being towed in, observing her movements, and gave no caution to the tug of the danger. But, assuming that it was his duty to have warned the tug, yet, as he was neither the owner, charterer, nor agent of the schooner, there seems to be no reason why she should be held responsible in any way for his misconduct.

Interlocutory decree for libellants.

See *The Vigilant*, ante, 765.

IRZO v. PERKINS and others.

(District Court, S. D. New York. November 14, 1881.)

1. SHIPPING—DELIVERY OF CARGO—USAGES OF PORT.

It is the duty of the vessel to make delivery of cargo, and where the bill of lading is silent as to the particular place and mode of delivery, it must be made according to the usages and regulations of the port, or the arrangements made with the consignee.

2. DEMURRAGE.

Where, on the arrival of a vessel, an arrangement was entered into between the ship's agent and the respondents, consignees of a part of the cargo, that the vessel should go to a particular dock, and that such part of the cargo should be delivered in lighters to be sent by the respondents to receive it, *held*, that such an arrangement, so long as it is unrevoked and is acted on by either, is binding upon the other, and as the vessel, upon the faith of such arrangement, went to the dock agreed upon and waited for lighters to be sent by the respondents, the latter are estopped to deny that the detention was by their procurement and for their benefit, and that they are liable for demurrage.

3. SAME—COSTS, WHEN NOT ALLOWED.

Where the claim of the libellant was in part upon a basis not sustained, and another portion of it was abandoned, costs were not allowed.

In Admiralty.

Beebe, Wilcox & Hobbs, for libellant.

Olin, Rives & Montgomery, for respondents.

BROWN, D. J. This is a libel *in personam* to recover damages in the nature of demurrage for the detention of the bark *Roma* in the delivery of 300 tons of iron consigned to the respondents at this port.

The iron was shipped at Marseilles, under the usual bill of lading, to be delivered to the respondents on payment of freight, with no special clause in reference to demurrage or mode of delivery. The cargo of the *Roma* was a mixed cargo, consigned to six different consignees. The portion consigned to the respondents was in the bottom of the hold. It was the greatest in weight, but not in bulk, of any of the different consignments, though it formed less than a major part of the cargo.

It appeared in evidence that there are but comparatively few wharves at this port where large quantities of iron will be received, for want of sufficient strength and solidity to bear its great weight, and that for this reason, as well as for greater economy in handling, iron is very frequently unladen in lighters. The *Roma* arrived in the lower bay on the tenth of November, 1879. On the same day the agent of the vessel called on the respondents, and inquired if they were going to take their iron on lighters, telling them, at the same time, that the other consignees had consented to the vessel going to the Atlantic dock, and asking if they had any objections. The respondent's ship-

ping clerk replied that they were going to take their iron on lighters; that that dock would suit them; and inquired when the vessel would be ready for the lighters, and was told in four or five days. The vessel thereupon went to the Atlantic dock, and by the 18th or 19th was ready to discharge the iron; but owing to great difficulty in procuring lighters at that time none was sent to receive it until the 26th, when one lighter was sent alongside and received about half the iron. On December 1st a berth for the vessel was obtained by the respondents at Merchants' Stores, to which the vessel was removed, and the rest of the iron was discharged there upon the wharf by December 6th. Four days were admitted to be a reasonable time for discharging the iron. The freight was paid December 8th, leaving the claim for demurrage, which had previously been rendered, unadjusted. This libel was thereafter filed on December 19, 1879, claiming 14 days' demurrage, viz., from the nineteenth of November to December 6th, less four days for delivery, and also claiming \$630 special damages for loss of more favorable return freights, which it is alleged the vessel would have obtained but for this detention.

It is the duty of the vessel to make delivery of the cargo. If the consignee will not receive it she must unlade it where she can, and store it suitably for the shipper's account. *Kennedy v. Dodge*, 1 Ben. 311; *Vose v. Allen*, 3 Blatchf. 289; *The Eddy*, 5 Wall. 481; *Arthur v. Schooner Cassius*, 2 Story, 81; *Ostrander v. Brown*, 15 Johns. 39; 1 Pars. Shipp. & Adm. 225; *Brittan v. Barnaby*, 21 How. 527.

Where, as in this case, the bill of lading is silent as to the particular place or mode of delivery, it must be made according to the usages and regulations of the port, or the arrangements made with the consignee. It is competent for the ship's agent to make such arrangements with the consignee, and any specific agreement so made by him in regard to the delivery will bind the ship. *The Grafton*, 1 Blatchf. 173.

The libellant sought to prove an established custom and usage at this port making it the duty of the consignee of iron, though it constituted but a minor part of the cargo, to provide a berth where the vessel could unlade it; and when a berth was so provided, that the ship was bound to go there to unload, although the rest of the cargo might be discharging elsewhere. Several witnesses testified with more or less distinctness to this custom; but it was denied by others having nearly equal opportunities of knowledge. As the force of such a custom depends upon the general knowledge of it and acquaintance in it, I must find, upon testimony so conflicting, that the alleged custom is not proved, although there is stronger support for such a usage in the case of the consignment of a whole cargo of iron to a single consignee.

I cannot doubt that at the interview between the agent of the *Roma* and the shipping clerk of the respondents, on the tenth of November, a complete understanding for the time being was had for the delivery of the iron at the Atlantic dock in lighters, to be sent by the respondents to receive it. The conversation then had was not, it is true, in form, a specific contract, like that in the case of *The Grafton*, 1 Blatchf. 173. They did not agree that the iron should absolutely and at all events be delivered into lighters and not otherwise. But both parties must have been aware of the difficulty in procuring a berth for unloading iron upon a wharf, as well as the greater economy of unloading in lighters; and when unloading on a wharf was first spoken of, the greater cost of doing so was a matter of objection by the respondents. The inquiry by the ship's agent on the tenth of November, before the ship had gone to a berth, was obviously in reference to these facts; and in answer to his inquiries it was expressly stated by the respondents that they would take the iron on lighters. The Atlantic dock was agreed upon as the place, and the time when the lighters were to be sent was approximately fixed. Both parties acquiesced in this arrangement. It was calculated to influence, and was manifestly designed to influence, the action of both parties in reference to the place and mode of delivery of the iron; and both parties immediately acted upon it,—the ship in going to the Atlantic dock, and in waiting for the lighters where she could not put iron on the wharf; and the respondents in taking steps with more or less diligence to get lighters, one of which was finally sent on the 26th. Such an arrangement, so long as it is unrevoked and is acted on by either, is, *ex aequo et bono*, binding upon the other. Had the respondents procured and sent lighters at the time specified, and found the iron already put upon some wharf elsewhere, without previous notice to the respondents, the ship must have been held answerable for the damages to the respondents, if any, in obtaining lighters upon the faith of the previous arrangement. And as the *Roma*, upon the faith of the same arrangement, went to a dock where iron could not be put upon the wharf, and waited for lighters to be sent by the respondents, the latter are estopped from denying that the detention of the ship was by their procurement and for their benefit.

In such cases the consignees must be held liable for demurrage *in personam*, notwithstanding the payment of freight, as much as the shippers would have been held upon any arrangement of their own in respect to the delivery. *Donaldson v. McDowell*, 1 Holmes, 290; *Stafford v. Watson*, 1 Biss. 437.

The respondents must, therefore, be held answerable for the damages to the libellant, so long as he acted upon and was legally justified in acting upon this arrangement. This continued until the ship's agent was notified by the respondents to put the iron upon the wharf, and if it would not be received at the Atlantic dock to put it upon any other wharf where the ship could find a berth therefor. This was a revocation and abandonment by the respondents of the previous arrangement, leaving them answerable for the damages incurred by the Roma up to that time. Thenceforward the Roma was remitted to her original obligation to find her own berth for the delivery of the iron, in the absence of sufficient proof of any usage to exempt her from that duty.

Most of the subsequent detention arose from the claim of the ship's agent that the consignees were bound to provide a berth, doing nothing himself to that end during the pendency of the dispute on that subject. The fact that on December 1st a berth for the delivery of the rest of the iron upon a wharf was procured by the respondents, cannot be suffered to prejudice their legal rights, nor be taken as any evidence whatever as against them of any legal obligation on their part to provide a berth, as this obligation was all the while clearly and unequivocally denied by them. It would be not only unjust, but in the highest degree impolitic, in cases of disputed obligations, to suffer the voluntary efforts of either party, in terminating a dispute and stopping the increase of damages, to be turned against them in any subsequent litigation. Such efforts ought, on the contrary, to be commended by the court as making for peace, and as evidences of an unlitigious *animus*.

The precise date when the respondents gave notice to the ship's agent to put the iron wherever he could find a wharf to receive it, does not very clearly appear. It was before the lighter was sent, and after complaints of the delay had been made, and, as near as I can make out from the evidence, was about November 24th. As the vessel was ready to deliver by the 19th, and as ample notice had been previously given the respondents to be in readiness by that date, the respondents must answer for those five days' delay; and, as there is no reason to doubt that a berth for the delivery of the iron at the wharf could have been obtained at first, as well as on December 1st, or that the vessel would have gone there but for the arrangement made for delivering on lighters, the respondents should pay for the delay and costs of removal to the second berth. No evidence of the charges so incurred was given, nor any reasons

for the ship's delay after the berth was procured on December 1st. But as some time must have been taken in such removal, I add one day's detention for this cause, making in all six days, which, at the rate of \$51 per day, the rate agreed on, gives \$306, with interest from December 6, 1879, for which the libellants are entitled to judgment; but as their claim was in part upon a basis not sustained, and another portion of it, viz., that for loss of freight, was abandoned, costs should not be allowed.

See *Reed v. Weld*, 6 FED. REP. 304.

CARAO v. GUIMARAES.*

{*District Court, E. D. Pennsylvania.* December 12, 1881.)

1. SHIPPING—FREIGHT MONEY, RECOVERY OF.

In a bill of lading reciting "the weight and quantity unknown; not accountable for the cork on deck and bursting of bundles, several of which open for stowage," the obligation as respects delivery in "good condition" is an obligation for proper stowage according to the usual custom of stowing such cargo: and where the weight of evidence justifies the belief that this custom was complied with, and delivery of the cargo was proved, *held*, that the master was entitled to recover the freight money.

Libel by the master of the bark *Samuele* against Jose de Bessa Guimaraes to recover freight on 800 bales of cork-wood. The bill of lading recited "the weight and quality unknown; not accountable for the cork on deck and bursting of bundles, several of which open for stowage." Respondent defended on the grounds (1) that there was a short delivery; (2) that the cork was injured by being stowed in contact with salt, which formed the balance of the cargo, when the custom was to separate it from the salt by mats or boards; (3) that the captain had unwarrantably cut open a large number of bales, to the great injury of the cork. The testimony was conflicting as to the delivery, the custom of stowage, and as to the necessity for cutting the bales.

John G. Johnson, for libellant.

Chas. Gibbons, Jr., for respondent.

BUTLER, D. J. The claim is for freight for carrying cork-wood. The defence set up is (1) short delivery; (2) unwarranted cutting of

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

bales; and (3) failure to deliver in "good order and condition. No question of law is involved; and very little space need be occupied in discussing the facts. An analysis of the testimony would require much time and labor, and be of little value. It is sufficient to say that, in the judgment of the court, neither of the allegations is sustained.

Unless the master and mate have sworn falsely, all the cargo shipped was delivered; and there is nothing to justify a belief that they have sworn falsely.

A fair construction of the contract (in the light of surrounding circumstances) seems to justify all the cutting of bales shown by the evidence. The object of cutting, and of the provision respecting it in the contract, was to provide for convenient stowage. It does not appear that any more bales were cut than was necessary for this purpose.

The obligation of the libellant, as respects delivery in "good condition," was an obligation for proper stowage, and did not extend beyond a requirement to comply with the usual custom of stowing such a cargo. The weight of the evidence justifies a belief that this custom was complied with. While the testimony here is conflicting, and the respondent's case was prepared with unusual care, and urged with much ability, a very patient examination has satisfied me that the weight of the evidence is with the libellant.

A decree must be entered against the respondent for freight, with costs.

UNITED STATES *v.* MULLAN and others.*(Circuit Court, D. California. February 27, 1882.)*

1. PUBLIC LANDS—KNOWN MINES—COAL.

Whatever may have been originally the proper construction of the word "mines," as used in the pre-emption act of 1841, (5 St. 456,) the act of July 1, 1864, (13 St. 343,) gave a legislative construction to the term, which thenceforth attached to all known "coal-beds or coal-fields" in which no interest had before become vested, and withdrew such coal lands from the operation of all other acts of congress.

2. SCHOOL AND COAL LANDS—STATE SELECTIONS.

After July 1, 1864, known coal lands were not subject to selection by the state, in lieu of sections 16 and 36, for school purposes; and the secretary of the interior had no authority to list such lands to the state on such selections.

3. PATENT VACATED—LIEN LANDS.

Where the state selects a tract of land in lieu of a like quantity of unavailable school lands, which tract so selected is not subject to selection, and the same is listed over to the state by the secretary of the interior, and by the state thereupon patented to private parties, a court of equity, upon a bill filed by the United States, will annul the selection, listing over, and patent, whether the unlawful acts arose out of fraud, inadvertence, or mistake, or errors of law committed by the officers upon known facts, as to the authority of the state to select or the secretary of the interior to list over.

4. BILL FILED BY ATTORNEY GENERAL.

Where a bill in chancery to annul a patent to land is filed in the name of the United States, having the signature of the attorney general of the United States, subscribed by his authority, the court is authorized to entertain the bill.

5. VESTED RIGHTS—POWER OF CONGRESS.

The state has no indefeasible vested right to select lands in lieu of sections 16 and 36, from any particular class of lands, at any time before selection actually made. Until selection, congress may withdraw any lands from the operation of laws permitting their selection.

In Equity.

Philip Teare and W. H. L. Barnes, for complainant.

B. S. Brooks, for defendants.

SAWYER, C. J. This is a bill in equity to vacate a state selection, a listing to the state by the secretary of the interior, and a patent issued by the state in pursuance thereof, to the north half of section 8, township 1 N., range 1 E., Mount Diablo meridian; the said tract having been selected by and listed to the state as school lands, in lieu of a half section of one of the sections 16, which was for some lawful reason unavailable to the state. The claim is that, at the time of the selection, listing, and issuing of the patent in question, the land was *known coal lands*, not subject to selection in lieu of school

lands, and that the listing over to the state, and issuing of the patent, were by fraud, or mistake, or error in law; at all events, without authority, and unlawful.

The facts, as clearly shown by the uncontradicted evidence, are:

That the Black Diamond Coal Company took possession of this half section of land as early as 1861, and from that time until after the patent issued, in 1871, continued in the possession of said land, working a coal mine upon it. It had tunnels, drifts, hoisting works, and other machinery, coal bunkers of large capacity, etc., on it, costing many thousands of dollars, and had constructed a railroad, operated by steam, to transport its coal to New York Landing, on the bay, some 12 miles distant, whence it was shipped to market. There was also a mining town built upon the land in question, occupied at different times by from several hundred to over a thousand inhabitants, all engaged in coal mining on this and adjacent lands, or in some way connected with the mining interests; there being no other occasion for a town at that point, and no other occupation for its inhabitants. The lands were situated on the side of Mount Diablo, at an elevated point, the surface rough and broken, of no use for agricultural purposes, and of inconsiderable utility even for pasturing, and of but trifling value for any purpose whatever, other than for the coal mines situated and worked thereon.

The lands were surveyed and sectionized in March, 1864, the surveyor professing to proceed under the act of 1853. The land was indicated on the plats and surveys as coal land. The land was selected as school land at the instance of one Frank Barnard, and, at his suggestion, and ostensibly for his use, located by Leander Ransom, state locating agent, on June 25, 1865. It was selected at the suggestion, and, doubtless, for the real benefit, of the Black Diamond Coal Company, which was at that time in occupation. But neither Barnard nor the company took measures to perfect the title. On August 28, 1868, the defendant Mullan, while the Black Diamond Coal Company was actually in possession, working the coal mine, both as is admitted in the answer and shown by the proofs, applied to John W. Bost, surveyor general of California, to purchase the land from the state, as having been selected by the state as school land, in lieu of a corresponding half of a section 16 not available. The surveyor general objected that it was coal land, and not subject to selection; but said Mullan insisted that it was subject to selection, and that the selection had been approved by the register of the land-office; that he was entitled to purchase, having offered to comply with the state law upon the subject; and that if the surveyor general should refuse to permit a purchase, he could compel him to do so by *mandamus*. Whereupon, on August 25, 1868, the surveyor general accepted the application to purchase. On April 27, 1869, he certified the selection to the United States land-office, and on May 21, 1869, he issued a certificate of purchase to Mullan. On June 3, 1871, the secretary of the interior listed the land to the state "subject to any interfering rights that may exist to them." On March 28, 1871, Mullan assigned his rights to defendant Avery, but, as testified by Avery, he still retains an interest in the land. On the same day Mullan also assigned to Avery any and all right to any claim which had accrued to him against the Black Diamond Coa-

Company for damages resulting from working the coal mine and taking out coal since the issue to him of a certificate of purchase, upon which assignment Avery, not long afterwards, sued the said company, claiming \$1,300,000 damages for coal taken out of the land. Avery denies that he knew that the Black Diamond Coal Mine was on the land at the time he acquired his interest, but admits that Mullan told him that it was in the neighborhood of coal, and that there might be coal on it. Mullan also states that he never saw the land before his purchase from the state.

The selection was made by the state, as is claimed, in pursuance of the act of congress of March 3, 1853, extending the pre-emption laws of 1841 over the public lands in California. A state patent, in pursuance of the selection, purchase, and listing, as hereinbefore stated, was issued to defendant Avery on April 6, 1871.

The first question that arises is whether the land in question was open to selection by the state. The pre-emption act of 1841 provides that "*no lands on which are situated any known salines, or mines, shall be liable to entry under and by virtue of the provisions of this act.*" 5 St. p. 456, § 10.

The act of March 3, 1853, extends the pre-emption laws of 1841 over the public lands in California, whether surveyed or unsurveyed, "with the exception of sections 16 and 36, which shall be, and hereby are, granted to the state for the purpose of public schools in each township." "Excepting, also, * * * the *mineral lands*," with other prescribed exceptions, and "*with all the exceptions, conditions, and limitations therein, except as herein otherwise provided.*" 10 St. p. 246, § 6. It is further provided in section 7 that when a settlement has been made on sections 16 and 36, before the lands shall be surveyed, reserved, etc., "other lands shall be selected by the proper authorities of the state in lieu thereof." "Nor shall any person obtain the benefit of this act by a settlement or location on *mineral lands.*"

In *Mining Co. v. Consolidated Mining Co.* the supreme court held "that the land in controversy being mineral lands, and *well known to be so when the surveys of it were made*, did not pass to the state under the school-section grant. It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853." 102 U. S. 175.

If sections 16 and 36 do not pass by the terms of the statute, there certainly is no good reason for permitting the same kind of land to be selected under section 7, in lieu of sections 16 and 36. 10 St. p. 247, § 7. In the act of June 1, 1864, it is provided "that when any tracts embracing *coal-beds or coal-fields*, constituting portions of the public domain, and which, as '*mines,*' are excluded from the *pre-emp-*

tion act of 1841, and which, under past legislation, are not liable to ordinary entry, it shall and may be lawful for the president to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder," etc. 13 St. p. 343, § 1. The act of March 3, 1865, further provides that any citizen who "may be in the business of *bona fide* actual coal mining on the public lands * * * shall have the right to enter, in legal subdivisions, a quantity of land * * * at the minimum price of \$20 per acre," etc. 13 St. p. 529, § 1. The act of July 26, 1866, confirms selections made by the state, under past legislation, of any lands granted to the state, "provided that no selection made by the state *contrary to existing laws* shall be confirmed by this act" as to a certain designated class, "or to any mineral lands." 14 St. p. 218, § 1.

Thus it will be seen, by a glance at the several provisions of the statutes quoted, that the statute of 1841, in express terms, excludes from pre-emption or sale all lands containing "*any known * * * mines*;" and there is no jurisdiction or power in any officer of the government to grant such lands. The act of 1853, extending the said pre-emption laws of 1841 over California, again expressly exempts "the mineral lands," and limits the act of 1841 in its operation by "*all the exceptions, conditions, and limitations therein*, except as herein otherwise provided." One of the exceptions therein, as we have seen, is "*any known * * * mines*," and this limitation is not otherwise extended in the act of 1853. Again, in section 7, authorizing, in certain cases, the selection of other lands in lieu of sections 16 and 36, it is again carefully provided that no person shall "obtain the benefits of this act by a settlement or location on mineral lands." Thus, if coal mines are "known mines" or "mineral lands," within the meaning of these acts, they were expressly excluded from pre-emption, sale, or selection under these acts, and there is no other act authorizing a selection. Are they "known mines" or "mineral land" within the provisions of the act of congress?

It is conceded that prior to the passage of the act of 1864, cited, the land department at Washington did not regard or treat coal lands, or coal mines, as mineral lands within the meaning of the prior acts of congress. It is so stated by Commissioner Drummond, *In re Youkum*, Copp's Public Land Laws, 674. But I am not aware of any judicial construction of these words of the statute as relating to coal lands. Whatever the proper judicial construction may have been prior to the act of 1864, congress has itself, in that act, given a legislative construction to the provisions in question, which is conclu-

sive upon the courts and departments from that time forward. Congress may not have the power, by a legislative construction which a statute will not bear, to affect the rights of parties already properly and legally vested under the statute, but it may, certainly, give a legislative construction which shall apply to all future cases and all subsequent acts. This it has, in my judgment, done in the present instance, whatever the proper prior construction may have been. The language, it has been seen, is, "when any tract embracing *coal-beds* or *coal-fields*, constituting portions of the public domain, and which, as 'mines,' are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary private entry," it shall be lawful to dispose of them in a prescribed mode, entirely different, and on much more onerous terms than are applicable to other public lands; and these terms are modified, but still different from other public lands, in several and all subsequent acts of congress. Here is a manifest intent to include coal lands in the definition of the terms "mines, mineral land," as used in the act of 1841, and "past legislation," otherwise the whole object and purpose of this part of the act would fail.

There are no coal lands as such mentioned in the act of 1841, or "which, 'as mines,' are excluded from the pre-emption act," or which, under past legislation, are not liable to ordinary private entry, unless they are embraced in the term "mines" or "minerals," as used in the act of 1841 and subsequent acts. Upon any other construction of the act of 1864, and subsequent acts, providing for a disposition of the coal lands in the public domain, there would be, absolutely, no lands and no subject-matter upon which these provisions in question could operate, as the coal lands provided for are only such as were excluded as "mines" in the act of 1841, and "past legislation." All coal lands not before excluded as "mines" would be governed by the ordinary statutory provisions as to a disposition of the public domain. On any other hypothesis no change in the law would be effected. It appears to me, therefore, to be indisputable that, at least since the act of 1864, and subsequent acts, on the subject, coal lands have, by legislative definition of the term "mines," as used in the act of 1841, been excluded from sale or selection otherwise than as provided in those acts. In view of these acts, and this legislative definition also, the act of 1866 excepts coal lands improperly selected from confirmation, under the terms of that act, and especially under the words any "mineral lands," in the first section.

There are railroad grants, it is true, which especially, and by express terms, provide that coal lands shall not be deemed mineral within the provisions of those acts. But this only shows that, in the opinion of congress, they would be included, if not specially in terms excluded.

From these considerations I am of opinion that the land in question was not subject to selection, and that the secretary of the interior had no power to list over to the state, or the state to grant a valid patent for it. The land not only contained coal mines, but, in the language of the act of 1841, "known mines" of coal, which were being actually and notoriously worked, and had been so worked for a period of seven years at the time defendant Mullan applied for their purchase from the state, and more than 11 years when he assigned to defendant Avery. The state had no vested right, as is claimed by defendant's counsel it had, to select lands in lieu of sections 16 and 36, so that the right to select could not be withdrawn from any particular lands or class of lands at any time before selection actually made. The indefeasible right to any particular land can only attach at the time of selection. *Ryan v. C. P. R. Co.* 5 Sawy. 260, affirmed in 99 U. S. 388; *Hutton v. Frisbie*, 37 Cal. 476; *Frisbie v. Whitney*, 9 Wall. 187. If she had an indefeasible vested right before an actual selection, there could be no final disposition of the public domain, so as to secure the grantee of the government a perfect title, till all the state selections should be made. If the state had an indefeasible vested right to select from any public land, then any grantee of the government, before the state's right is satisfied, would take the title, subject to be defeated by a subsequent state selection.

Upon the only other substantial question in the case I have as little doubt, viz., that the selection, listing over to the state, and the patent issued thereon by the state, can be decreed void or annulled on a bill in chancery directly filed by the United States for that purpose. The numerous decisions cited to show that the examination and decision of the land department upon the facts are conclusive, are mostly, if not all of them, collateral proceedings, where it is sought to attack the acts of those officers at law, and not by direct proceedings by the government to annul the patent.

In cases like this there is no jurisdiction or power in the officers of the land department to affect the title of the United States. There were "known mines" on the land openly and notoriously worked. It was an obvious, public, notorious, historical fact, open to everybody's

observation. The plats of surveys in the public land-office showed it to be so. A public mining town was situate on the land, occupied by miners actually engaged in working the mines. No one could be possibly ignorant of the character of the land who would investigate, or, in fact, without actually shutting his eyes against open, public, notorious, obvious facts. Mullan must have known, and Avery must have known, the truth, or else they were wilfully ignorant and blind to what the law required them to see and know. They may not have been—probably never were—on the land, and they may have never seen with their own eyes what was going on in that region, but they are bound to know, and will be deemed in law to know, what every one must see if he will take the trouble to look at land notoriously and obviously occupied as this land was; and the same must be true with respect to the public officers whose duty it was to deal with the land, having in their office plats and surveys showing that there are known coal mines on the land. There must have been either fraud, mistake, or an error of law upon known facts, in the several transactions resulting in the patent; and either is sufficient to annul it, and is sufficiently presented by the bill.

I am not disposed to think that there was actual wilful fraud intended by either of the defendants, or the officers of the government. It is much more probable that there was an inadvertence or mistake, or an error in law upon the known facts; for it is scarcely to be believed that the facts were not known, at least to the parties in this region. Indeed, they were discussed between the defendant Mullan and the surveyor general of California; and even Avery, upon his own testimony, had his attention in fact called to the probability that coal might be found on the land; and this was, doubtless, one of the inducements to advance money on it. As coal lands had been sold prior to the act of 1864 as ordinary lands, it may be that there was a misapprehension at the local land-office as to those lands being open to selection; and the facts prior to the listing being presented by parties at Washington, probably *ex parte*, it would seem that they may not have been fully comprehended or appreciated.

If the secretary of the interior was not in fact informed, and the listing was in ignorance of the facts, then there was an inadvertence or mistake. If he did know the facts, he acted beyond the scope of his jurisdiction and authority, and his act was void for want of power. That a bill on behalf of the United States will lie to annul those proceedings is clear from the authorities.

In *Moore v. Robbins*, 96 U. S. 533, the court says upon this point: "If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the *cancellation* of the deed of conveyance of the land as to individuals; and if the government is the party injured this is the proper course." A patent is the deed of the government.

In *U. S. v. Stone*, 2 Wall. 525, the court says:

"A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, *until it is set aside or annulled* by some judicial tribunal. In England this was originally done by *scire facias*; but a bill in chancery is found a more convenient remedy. Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued *unadvisedly* or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially, not judicially. *If he issues a patent for land reserved from sale by law, such patent is void for want of authority.* * * * It is contended here by counsel of the United States that the land for which a patent was granted to the appellant was reserved from sale for use of the government, and consequently that the patent was void. And, *although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed.*"

Such a bill is this in relation to lands reserved from selection and patent under the acts in question, and the allegations of the bill are fully sustained by the proofs. *Hughes, v. U. S.* 4 Wall. 235, and *U. S. v. Hughes*, 11 How. 555, and *Johnson v. Towsley*, 13 Wall. 83-4, establish the same principle.

In this case there must have been either fraud, an inadvertence, or mistake, or an error of law upon known facts; for in the very nature of things, in view of the open, public, notorious occupation of the lands, and the extensive mining for coal thereon, it is impossible that there could be any error of judgment as to the facts, had the evidence been laid before the officers of the land department of the government.

An objection is made that the bill is not filed by the attorney general, and in his name. The bill commences: "The United States of America, by Philip Teare, United States attorney in and for the district of California, brings this bill of complaint, * * * and thereupon your orator complains," etc. It is signed at the foot of

the bill, after the prayer for relief, "Charles Devens, Attorney General, by Philip Teare, United States Attorney for the district of California." I think it appears from the record that the attorney general brings or authorizes the filing of the bill, has control, and is the responsible manager of the case, within the principle stated in *U. S. v. Throckmorton*, 98 U. S. 70. So, also, it appears to me that the letter of the attorney general set out in the answer is full authority for the proceeding. But this bill was signed upon authority of another letter of the attorney general expressly written for the purpose.

This suit is, doubtless, prosecuted at the instigation of the Black Diamond Coal Company, and while the company, after working and exhausting the coal for years without availing itself of the right to purchase the land at a comparatively small sum, as it might and honestly should have done, and is, therefore, entitled to little sympathy should the defendants gain the land; yet the United States has seen fit to intervene to vacate the proceedings, as it had a right to do, and there must be a decree for the complainant annulling the state selection, the listing, and the patent issued thereon, and it is so ordered.

BOOKWALTER and others v. CLARK and others.

(*Circuit Court, W. D. Wisconsin.* January 21, 1882.)

1. CONTRACT—MEASURE OF DAMAGES FOR BREACH OF.

Defendants ordered plaintiffs to manufacture a certain water-wheel, to be shipped to them by a certain date, agreeing to pay for the same in money and notes. Plaintiffs fulfilled their contract and tendered delivery, but defendants refused to receive the goods or pay for them, they having had the opportunity to inspect them, and making no point that the goods were not perfect. *Held*, that plaintiffs are entitled to recover, as their true measure of damages for non-fulfilment, the contract price of the article, though no title had passed.

In Chancery.

BUNN, D. J. This case was tried before the court without a jury, a jury having been waived by the consent of parties in open court. There is no dispute about the facts. On December 17, 1880, defendants made an order in writing upon the plaintiffs, signed by them, which was delivered to and accepted by the plaintiffs, as follows:

"WAUSAU, WISCONSIN, December 17, 1880.

"*James Laffel & Co., Springfield, Ohio:* You will please manufacture and ship to the undersigned, at Wausau, Wisconsin, Marathon county, one of your 66-inch Leffel water-wheels, running with saw. Bore top half of coupling 5½. Wheel to be shipped by the fifteenth day of February, 1881. To drive gang-mill situated in Wausau, Wisconsin, and displaces ——— wheel under 10 feet head and fall.

"In consideration of which the undersigned agree to pay, with exchange, besides freight from manufactory, the sum of \$950; \$300 cash, balance in good notes, drawing 7 per cent. interest, payable in six and nine months from date of shipment. After the wheel has run 30 days, they want privilege of taking up notes at a discount of 3 per cent.

[Signed]

"CLARK, IRELAND & CO., Wausau, Wisconsin."

This order was, on the day of its date, delivered by defendants to D. J. Murray, residing at Wausau, who was acting as local agent of plaintiffs in taking orders for plaintiffs for the manufacture of machinery, and forwarded by him on the next day to the plaintiffs, at Springfield, Ohio, who received it by due course of mail, on December 20th, and on that day or the next proceeded to manufacture the wheel, which they completed according to contract in about 12 or 15 days from the receipt of the order, and on the thirteenth of January shipped it to the defendants, at Wausau, according to the directions in the order, notifying defendants of its shipment, and enclosing blank notes for them to sign and return. The wheel reached the railroad depot in Wausau by due course of freight, when the defendants saw and had a chance to inspect the same; but they refused to receive the wheel or to pay the purchase price. This action is brought, setting forth all the facts, to recover the amount of the contract price of the machinery, either as upon a sale and delivery of the goods manufactured, or as damages for non-performance of the contract on defendants' part.

Defendant John Clark testifies that about December 20th he went to the agent, Murray, who had taken the order, and told him that he was negotiating with C. P. Hazleton for a second-hand wheel, and wanted him to hold on to the order, and told Murray to write to plaintiffs at Springfield to delay the manufacture. On December 30th Murray wrote as follows to plaintiffs:

"WAUSAU, WISCONSIN, December 30, 1880.

"GENTS: Messrs. Clark, Ireland & Co. came here and requested me to write you and say they think some of purchasing a second-hand wheel, and would ask you to hold on with the order for the 66-inch wheel. You had better write them. The matter is in your hands.

"Yours, truly,

D. J. MURRAY."

This letter was received by the plaintiffs at Springfield on January 3d, and an answer by letter returned by them on that day to defendants stating that they were not willing, under the circumstances, that defendants should purchase anything but the Leffel wheel, and that they were not disposed to give up a contract upon which they had already done considerable work; that they expected to complete and ship their wheel at the time agreed in the contract. The wheel at this time was in course of manufacture, and about half done. This letter was received by the defendants at Wausau on January 5th, and on that day they wrote themselves to the plaintiffs as follows:

“WAUSAU, WISCONSIN, January 5, 1881.

“*James Leffel & Co., Springfield, Ohio*—SIRS: Yours of the 3d received. We ordered through Mr. Murray, your agent, a wheel, and a day or two after we told him to notify you to hold on with the order, as we were not positive we wanted it. You sold C. P. Hazeltine & Co. a wheel of that size and kind which he designs to take out, and use steam instead, and we have been negotiating with them for the wheel, pinions, core-wheel, and shafting; and, if he finally concludes to put in steam, we shall buy of him, and do not want your wheel; and, if he does not make the contemplated change, we want the wheel of you. If you want to deal that way, all right; if not, you can consider the order countermanded now, and we will take our chances of getting a wheel that will suit as well as yours. The wheel Mr. Hazeltine has got is your make of wheel, and if he does not want to use it you had not ought to stop his selling it by crowding. Will let you know within 10 days the result of trade with Hazeltine.

“Yours, respectfully,

CLARK, IRELAND & Co.”

When this letter was received by the plaintiffs, on January 8th, the wheel was nearly completed.

The plaintiffs' testimony shows that this wheel was unusually large, and they did not keep such in stock, and only made them to order; that 44-inch wheels were as large as they kept in stock, and that it was only occasionally that they had an order for so large a one as this; that it consisted of some 20 large castings and a great many small pieces, and that it would ordinarily require considerable change to fit another customer if they found one wanting so large a one; that some of the wheels ran with and some against the saw, and that a wheel made to run with the saw could not be made to fit with machinery that was intended for the other kind.

The defendants had ample opportunity to inspect the machinery at Wausau, and there is no point made that it is not manufactured in all respects and shipped according to the contract. It is admitted

also that defendants have broken their own contract *in toto*; but they insist that the plaintiffs are not entitled to recover the full value of the machinery, but only the difference between the contract price and market price, leaving the wheel for plaintiffs to dispose of as best they may, and that they are not entitled to recover at all in this suit.

But whether or not that rule be more properly applicable in cases of stocks or ordinary merchandise already in existence when the contract is made, and which has some certain market value, it seems quite clear to me that it is not the one which metes out the most exact justice between the contracting parties in a case of this kind, or which is best sustained by reason or authority.

In the first class of cases the authorities are decided; some holding, as in *Thorndike v. Locke*, 98 Mass. —, and *Pearson v. Mason*, 120 Mass. 53, that the vendor of the goods, upon tender made of delivery and refusal to receive, may leave the goods with the vendee, or with some person for him, and recover the contract price; or that he may keep the goods and recover as damages the difference between the contract price and the market value at the time of the breach; or that he may resell the goods and charge his vendee with the difference between the selling and contract price; while other cases, as in *Gordon v. Norris*, 49 N. H. 376, confine the vendor to the last two remedies named, and deny him the first, on the ground that, the defendant refusing to accept, no title passes and the vendors cannot have the goods and their value.

But where a person orders an article to be manufactured according to a certain measure, pattern, or style, as a suit of clothes, or a carriage, or a steam-engine, here, I think, the weight of authority and the best reason concur that the manufacturer, after he has completed his contract and tendered the article, is entitled to recover the contract price.

The reason for the distinction is that in such a case there is presumably no certain market value for goods made according to such a specific order, and that the manufacturer having done all that is required of him to do to entitle him to the full benefit of his contract, he cannot, with any certainty, have this full benefit in any other way. If he was required to resell an article of this kind before he could maintain his action, he might be compelled to wait until the vendee should become irresponsible, and the article might have no market value, or no appreciable value at all, for any other person

except the one ordering. In such a case it seems more just and equitable that the loss and inconvenience of having a cumbrous article like the one in suit on hand for sale, and taking the chances of finding a purchaser, should fall upon the party who is in fault in not fulfilling his contract, rather than upon the party who is in no fault, and is claiming nothing but just what the other party has agreed to do.

It may be that if the defendants had countermanded the order before any work had been done, and especially if they had also tendered to the plaintiffs the fair profits of the manufacture, that it would have been the duty of the plaintiffs to have desisted from going on with the work. But when the letter from Mr. Murray was received the work was in progress and about half completed; besides the defendants did not remand their order, nor in any way attempt to rescind their contract, but simply requested the plaintiffs to delay the manufacture until they could have time to see if they could consummate a trade with another party to better advantage. If they could not, they still wanted the wheel. It is evident that the plaintiffs were not bound to delay the manufacture for such a purpose. If it takes two to make a contract, it also takes two to rescind or modify one. I think the plaintiffs were justified in continuing the work, and shipping the wheel according to the terms of the contract.

Many of the cases on this subject turn upon a mere question of pleading; or whether, where there is no delivery and no title passes, the vendor can maintain *assumpsit* for the purchase price *as upon a sale*. There is no question of that kind here. The facts are all set up, and the plaintiffs are entitled to such relief as the facts seem to justify, whether it be a judgment for the purchase price, as in *assumpsit*, or for damages for a non-fulfilment of the contract on defendants' part. And the case does not turn in my judgment upon the question as to whether the title to the goods has passed from plaintiffs to defendants. If the plaintiffs have fulfilled their contract, and delivered or tendered delivery, this is all they can do; and if defendants refuse to accept the goods, and being made to order, they are, presumably, not marketable, I think the plaintiffs are entitled to recover, as their true measure of damages for non-fulfilment, the contract price of the article, though it be conceded that no title has passed. The title, I think, in such cases would pass upon the rendition of judgment.

But is it clear that no title has passed? It is shown that the wheel was manufactured and shipped on board the cars at Springfield accord-

ing to the contract. This was all the plaintiffs could do, and it seems to be the delivery contemplated by the parties; and as further confirmation of this, they provide for interest on the notes from the day of shipment at Springfield. Undoubtedly the defendants had the right to inspect the goods upon their arrival at Wausau, and upon such inspection, if they found them not in compliance with contract, they would not be bound to pay for them. But, as the case stands, it is just the same as if defendants had inspected them, and found them in compliance. They had the opportunity to inspect them, and they make no point that the goods are not perfect, but only that they had changed or might change their minds about wanting them, and had notified the plaintiffs to withhold the manufacture until further orders. The general rule is in such cases that no title passes until the goods are manufactured and delivered, *or are ready for delivery*. These were certainly ready for delivery, and I think it not at all clear that they were not delivered when shipped at Springfield, subject only to defendants' right of inspection and rejection of the goods at Wausau, in case they should be found not to comply with the contract. However this may be, I think the plaintiffs entitled to recover the contract price of the goods, with interest at 7 per cent. from the time of shipment. *Bement v. Smith*, 15 Wend. 493; *Ballentine v. Robinson*, 46 Pa. 177; *Shawhan v. Vanpest*, 15 Am. Law Reg. (N. S.) 153.

In this last case, which was recently decided by the supreme court of Ohio, the authorities are so fully and ably reviewed that no further discussion of them seems necessary.

HINSDALE-DOYLE GRANITE Co. v. TILLEY and others.

(Circuit Court, N. D. Illinois. November, 1881.)

1. CREDITOR'S BILL—MUNICIPAL DEBT.

Municipal corporation held to answer. Demurrer of the city of Chicago that a municipal corporation cannot be held to answer a creditor's bill, overruled.

In Chancery.

C. A. Knight, in support of the demurrer:

This proceeding is in effect the same as garnishment, and the courts hold, and public policy requires, that municipal corporations should be exempted from answering in mere proceedings to collect debts. *Merwin v. Chicago*, 45 Ill. 133; *Chicago v. Halsey*, 25 Ill. 596; *Triebel v. Colburn*, 64 Ill. 376; *Dillon, Mun. Corp.* § 65. Also, the bill makes no allegation that there is money in the city's treasury to pay this judgment, which the city could only be compelled to pay by *mandamus*.

H. M. Matthews, contra:

At law, in the construction of garnishment statutes, there is no generally-recognized principle of public policy exempting municipal corporations from their effect. *City of Newark v. Funk*, 15 Ohio St. 462; *Hadley v. Peabody*, 13 Gray, 200; *Bray v. Wallingford*, 20 Conn. 416; *Whidden v. Drake*, 5 N. H. 18; *Wales v. Muscatine*, 4 Iowa, 302; N. Y. Procedure. Equity jurisdiction is ancient and ample, and not limited by the construction given to garnishment acts. *Balch v. Westall*, 1 P. Wms. 445; *Smithier v. Lewis*, 1 Vernon, 398; *Stileman v. Ashdown*, 2 Atk. 477; *Taylor v. Jones*, 2 Atk. 602; *Pendleton v. Perkins*, 49 Mo. 565; *Singer & Talcott Stone Co. v. Wheeler*, 6 Bradw. 225; *Lyell v. Sup'rs of St. Clair Co.* 3 McLean, 580. No execution against the city is asked by the bill, and no question about a *mandamus* can be raised by the demurrer.

BLODGETT, D. J. I have no doubt that this is a proper proceeding against the city. It operates to place the complainant in the shoes of the creditor of the city, and requires the city to pay to the complainant. The court has jurisdiction to entertain a creditor's bill of this kind, where a municipal corporation is a party defendant, and I think the demurrer should be overruled.

Let the demurrer to the bill by the city of Chicago be overruled

DUNCAN v. GREENWALT.*

(Circuit Court, E. D. Missouri. March 21, 1882.)

1. COURTS OF EQUITY—JURISDICTION—PRACTICE—STATUTORY ACTIONS.

Where the statutes of a state, in which the distinction between actions in chancery and suits at law is abolished, provide for a particular action, the question whether a federal court held in that state should regard that action, when brought before it, as legal or equitable, must depend upon the facts stated and the relief sought. If the suit appears to be in the nature of a suit in equity, it should go upon the equity calendar, and be proceeded with in accordance with the equity rules.

2. SAME—SAME—ACTION TO QUIET TITLE.

Courts of equity have jurisdiction over suits to quiet the title to real estate.

In Equity.

This is a bill in equity filed by the complainant to quiet the title to certain real estate, situated in the city of St. Louis, by removing a cloud therefrom, caused, as is alleged, by the execution to the defendant's grantor of a certain tax deed. It is alleged that the pretended tax sale, and the deed executed in pursuance thereof, were void because of the failure to comply with the provisions of the statute of Missouri concerning tax sales. The respondent demurs to the bill upon the ground that under certain statutes of Missouri the complainant has a plain, speedy, and adequate remedy at law.

E. Cunningham, Jr., for complainant.

E. R. Monk, for respondent.

MCCRARY, C. J., (*orally*.) The bill as it now stands is plainly a bill to quiet title to the real estate in controversy by removing a cloud therefrom, and it is properly brought upon the equity side of the court, in accordance with long-established rules, unless it be true, as claimed by counsel for the respondent, that a plain, speedy, and adequate remedy at law is provided by certain statutes of Missouri. The first of these is section 6852 of the Revised Statutes of Missouri, which provides as follows:

"Any person hereafter putting a tax deed on record in the proper county shall be deemed to have set up such a title to the land described therein as shall enable the party claiming to own the same land to maintain an action for the recovery of the possession thereof against the grantee in deed, or any person claiming under him, whether such grantee or person is in actual possession of the land or not."

Counsel for the respondent is in error in insisting that a remedy given by statute is necessarily a remedy at law. The Code of Mis-

*Reported by B. F. Rex, Esq., of the St. Louis bar.

souri, like the codes of many other states, abolishes the distinction between actions in chancery and suits at law, and provides for the mingling the two in the same proceedings. The statute, therefore, provides both for equitable and legal proceedings. And when the statute provides, as in the section just quoted, for a particular action, the question whether that action is to be regarded in this court as equitable or legal must depend upon the facts stated, and the nature of the relief sought. Although authorized by the Code it may be an equitable action. It is insisted that this section provides for a suit by a party in possession. If it has that meaning it is certainly an anomaly in the way of legislation, for in the very nature of things a suit to recover possession of real estate cannot be maintained by a party who already has possession. The statute, however, does not provide that a suit for possession may be brought by a party who already has the possession; it provides that such a suit may be brought against the grantee in a tax deed, or his assignee, whether such grantee or assignee is in possession of the land or not. It may apply to a case where the land is not occupied in fact. But, even if construed to apply to such a case as the present one, I do not think it provides for an exclusive remedy at law.

In the state courts it might be held that a proceeding instituted under this section would afford the complainant an ample remedy, because either an equitable or legal action might be brought thereunder. But when such an action comes into this court we are bound by the equity practice which prevails here to look into the case, and if it appears to be in its nature a suit in equity, it must go upon our equity calendar, and be proceeded with in accordance with the equity rules. The section, therefore, does not prescribe for all actions a remedy at law, nor can I say that it prescribes such a remedy in the present case, since the bill shows upon its face a case in equity.

The other statutory provision relied upon by the respondent is section 3561 of the Revised Statutes of Missouri, which provides in substance that a party in possession of real estate may bring action against a party out of possession, who claims title, to require him to commence his suit at law to settle the question of his rights. It has been expressly held by the supreme court of Missouri that this section does not give an exclusive remedy at law so as to oust the jurisdiction of a court of equity in a case brought to remove a cloud from the title. *Harrington v. Utterback*, 57 Mo. 519.

If the respondent, however, thinks that the question of title in this case can be and should be determined in a court of law, where there can be a trial by jury, she is at liberty to institute such a suit, which she can do at any time, the complainant being in possession. The fact that a bill in chancery has been filed does not estop respondent from commencing an action at law. If such an action be commenced the court will then determine whether the suit in equity should be stayed until after a trial in the action at law.

The demurrer to the bill is overruled.

TREAT, D. J., concurs.

UNITED STATES *v.* HARDEN and others.

(*District Court, W. D. North Carolina. November Term, 1881.*)

1. CRIMINAL PROCEDURE—ARREST AND REMOVAL OF OFFENDERS FOR TRIAL.

Section 1014, Rev. St. in conferring criminal jurisdiction on commissioners appointed by the circuit courts, declares that proceedings before them shall be agreeably "to the usual mode of process" in the state where they are appointed; from which it may be inferred that it was the intention of congress to assimilate all proceedings for holding persons accused of crime to answer before a court of the United States, to the proceedings had for similar purposes by the laws of the state where such court is held.

2. COURT COMMISSIONERS—AUTHORITY TO COMMIT.

The commissioners have authority under the state statutes to commit defendants to county jails. The *mittimus* must be directed to the marshal, commanding him to convey the prisoner into the custody of the jailer, and it must also direct the jailer to receive the prisoner and keep him in close custody until discharged or taken from his custody by some proper process of law. Commissioners have similar powers in United States cases as justices of the peace have in state cases.

3. AUTHORITY OF MARSHAL.

The commitment of the prisoner to the county jail is not an absolute commitment, as the marshal can take the prisoner out of the custody of the jailer when it becomes necessary for him to complete the service by *capias* by producing the body of the prisoner at the ensuing term of court.

4. SAME—ORDER OF COURT OR DISTRICT ATTORNEY.

Section 1030, Rev. St., directs that "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or district attorney."

5. MARSHAL—POWERS DEFINED.

Section 788, Rev. St., provides that marshals in each state, in executing the laws of the United States, shall have the same powers as sheriffs in executing the laws of the state. The proper practice in the execution of their powers suggested.

DICK, D. J. In this case the jailer of this county informs the court that he has in his custody the defendants, who were delivered to him by the marshal without any warrant of commitment, and he requests the court to make an order authorizing him to keep said defendants in his prison.

The marshal informs the court that said prisoners were under proper warrants committed to jail in Henderson county for the want of bail required by a commissioner after a preliminary examination before him; and without any warrant they had been transported to this county for trial in this court. The marshal requests instructions as to how he shall act in such cases, as they are of frequent occurrence, and he never has a warrant authorizing transportation, but he has always regarded it as his duty to have such prisoners in court for trial.

As it is important that there should be connection, uniformity, and regularity in all criminal proceedings, I deem it proper to deliver a written opinion upon the questions presented by the jailer and the marshal in this case, and also upon some other subjects which have been called to my attention by United States commissioners. In doing so I will briefly state some of the powers and duties of commissioners as examining and committing magistrates. The circuit court is authorized by statute to appoint as many commissioners in the district as it may deem necessary; and when so appointed they should exercise the powers which are or may be expressly conferred upon them by law. They are not strictly officers of the circuit court, but exercise somewhat independent powers. They may be controlled by the court by general rules and by the mandatory writs by which courts of superior jurisdiction can control the action of courts and officers of inferior jurisdiction and powers. The forms and mode of procedure before commissioners are not expressly marked out and defined in any statute of the United States.

Section 1014, Rev. St., in conferring criminal jurisdiction upon such officers, declares that proceedings before them shall be agreeably "to the usual mode of process" in the state where they are appointed. We may well infer that it was the intention of congress to assimilate all proceedings for holding persons accused of crime to answer before a court of the United States to the proceedings had for similar purposes by the laws of the state where such court is held. We must therefore look to the laws of this state to see what powers and duties are imposed upon justices of the peace, and what are the

forms and modes of proceeding used by them as examining and committing magistrates.

Since the adoption of the present state constitution various statutes have been enacted which have enumerated with great particularity and precision the powers and duties of justices of the peace both in civil and criminal cases. The old system has been revised, amended, and greatly improved both by the legislature and the decisions of the supreme court, so that now there is scarcely ever any occasion to refer to the old English statutes and decided cases for information and guidance upon the subject. But as courts of justices of the peace had their origin in the common law, questions of "new impression" may still arise, in the determination of which we may have to refer to that bountiful source of legal knowledge and wisdom.

The laws of this state impose upon justices of the peace many important duties, and confer upon them extensive powers for the purpose of preserving the good order of society, by suppressing disturbances, and bringing violators of the criminal law to speedy justice. They are conservators of the peace, and when a felony or breach of the peace is committed in their presence they may issue a warrant of arrest without any previous affidavit, or they may verbally order the offender to be taken into custody. If a crime has been committed out of their presence they must issue a warrant, founded upon an affidavit of some credible person, showing probable cause for believing that the crime alleged has been committed by the person charged. When an alleged offender is brought before a justice of the peace for examination, he is entitled to have a fair and full investigation of the matters charged in the warrant, and the justice must advise him of his legal rights on examination, and allow him a reasonable time to summon witnesses, and consult with and employ counsel to aid him in his defence. Bat. Rev. Ch. 33.

These imperative duties necessarily confer upon the magistrate the power of continuance to a future day. The rights and privileges expressly conferred by law upon a defendant would be of little benefit if he cannot give bail during the continuance of his case, for if he is committed to prison he will not have convenient opportunity of preparing his defence. I believe that the right of thus being relieved from imprisonment when arrested, in a bailable case, is a right which cannot lawfully be denied when an examination is properly continued to a future day.

There is no statute in this state which expressly confers upon a magistrate the power to take bail for appearance before him at a future day, but from the regard which the law has for the liberty of the citizen, and the "reason of the thing," I believe he has such power. I am fully aware of the principle of law that the powers of courts of limited jurisdiction cannot be *extended* by implication, but when imperative duties are imposed and certain express powers are conferred upon such courts by law, they can properly use the auxiliary means and methods necessary to perform such duties and fully exercise such powers, if such means and methods are according to the course and practice of courts of common law in administering ordinary and substantial justice. This course is certainly allowable in courts whose powers and forms of procedure originated in the common law. Such powers have always been exercised by examining magistrates in this state, and have never been denied by the supreme court. They were claimed and exercised by Chief Justice Marshall on the preliminary examination of Burr.

I am inclined to believe that when bail is taken in such cases by justices of the peace, it should be by bond in the nature of a recognizance, where the principal and sureties sign their names, as courts of justices of the peace are not courts of record, authorized to take acknowledgment of recognizances for future appearance before them. If a defendant should make default I have not formed a decided opinion as to the proper manner of enforcing the forfeiture, and I am not aware of any decision of the supreme court on the subject. Although courts of justices of the peace are not in matters of this kind strictly courts of record, judicial proceedings before them resemble records in the conclusiveness of their effects, but they do not conclusively prove themselves; yet when proved they have the power and effect of judgments of courts of record. *Reeves v. Davis*, 80 N. C. 209.

Justices of the peace are required by law to keep dockets and enter a summary of their proceedings therein, and it seems to me that any judgment entered by them upon a bond which they had the power to take in the name of the state, after proceeding in conformity with the course and practice of courts of record in such matters, would be a valid judgment and could be enforced.

If an examination before a justice of the peace is continued to a future day, the officer having the defendant in custody has no power to commit him to prison without a *mittimus* from the justice, and the officer cannot certainly be required to keep a prisoner for a long time in his own personal custody.

In *State v. James*, 80 N. C. 370, it is decided that a verbal order of a justice of the peace sending a prisoner to jail, whether made before or after the examination on a warrant, is not a sufficient authority to the officer to whom such order is given. If a defendant, on a continuance, fails to give the bond required, then he may be committed to prison for such failure, but the examination must be had in a very short time, unless postponed at the request of the prisoner. I feel sure that a magistrate has no right to commit to prison a defendant before time for examination, when the defendant is ready to give bail in a bailable case, and when no sufficient cause of commitment judicially appears, and when the law requires every *mittimus* to show on its face a good cause of commitment.

If, then, a defendant, on an examination before a justice of the peace on a charge of crime, is entitled to have time to make preparation for a full and fair investigation, and the right to give bail for an appearance at a future day, the bail-bond thus given must be valid and enforceable, if there should not be a compliance with the condition of such bond. I deem it proper to have considered thus far some of the powers and duties of justices of the peace in criminal matters in this state, as commissioners are required to exercise many of these powers in performing their duties in enforcing the criminal laws of the United States, and such questions have been brought to my attention by the marshal and commissioners in the course of official duty.

United States commissioners are not conservators of the peace and have no control of police regulations in their districts except where express powers are conferred by a statute of the United States. Their powers and duties in criminal matters are not, therefore, as extensive as those of justices of the peace, but are confined to those which they must necessarily exercise as examining and committing magistrates in enforcing the criminal laws of the United States, and within this limit of jurisdiction they must conform, as near as may be, to the forms and modes of procedure required by law of justices of the peace. They are not prosecuting officers, but exercise important judicial functions in passing upon questions involving the rights of the government and the liberty of the citizen. The government has appointed proper ministerial officers, and imposed upon them the duties of making diligent inquiry as to violations of law and bringing offenders to justice.

I have heretofore given instructions to commissioners upon this subject by rules of court, and I will now only incidentally refer to matters embraced in such instructions. Some of the powers and

duties of commissioners have been stated in an opinion in the *Case of Nicholas Ebbs*, delivered at this term, (10 FED. REP. 369,) and I deem it unnecessary to restate them in this opinion, except when closely connected with other matters now under consideration.

Commissioners have authority to commit defendants to county jails, as there is a state statute which provides:

"That when a prisoner shall be committed to the keeper of any jail in the state by the authority of the United States, such keeper shall receive the prisoner and commit him accordingly; and every keeper of a jail refusing or neglecting to take possession of a prisoner delivered to him by the authority aforesaid, shall be subject to the same penalties as for neglect or refusal to commit any prisoner delivered to him under the authority of the state." Bat. Rev. 695.

The *mittimus* must be directed to the marshal commanding him to convey the prisoner into the custody of the jailer, and it must also direct and command the jailer to receive the prisoner and keep him in close custody until discharged, or taken from his custody by some proper process of law. The marshal must deliver a copy of such *mittimus* to the jailer as his authority to hold the prisoner, and the original warrant, with due entry of service, must be returned to the proper officer.

A jailer ought never to receive a prisoner into his custody without some written authority to detain him, issued by a person having power to grant such authority, except under the order of a court in session. When the marshal or his deputies have arrested a person, and there is some urgent necessity for committing him to jail, they ought to furnish a copy of the warrant to the jailer, and a written statement of the causes which induce the necessity for such commitment. Where the marshal or his deputy arrests a defendant on a *capias* from a court of record, he has power to take a recognizance of bail as sheriffs can do, and if the defendant fails to give bail he may commit him to a jailer, but he ought to give the jailer a written statement of the authority under which he makes such commitment.

This is not an absolute commitment, as the marshal can take the prisoner out of the custody of the jailer when it becomes necessary for him to complete the service of the *capias* by producing the body of the prisoner at the ensuing term of court.

In this state the powers and duties of a justice of the peace are generally confined to his county of residence, and his warrants can only run within such limits. He may issue a warrant to arrest a person in his county for an offence committed in another county, and

make examination of the matter, and may hold to bail or commit the prisoner to the jail of his own county or to the jail of the county in which the offence was committed. If he commits to the jail of his own county, I am inclined to think that his power ceases, and he cannot afterwards issue a warrant to transport such prisoner to another county for trial. This transportation can only properly be done by a writ of *habeas corpus* issued by a judge of a court of superior jurisdiction.

In England it was provided by the *habeas corpus* act that if any subject should be committed to any prison, or in custody of any officer, for any supposed criminal matter, he should not be removed from such custody into the custody of any other officer unless it be by *habeas corpus* or some other legal writ. 1 Chit. C. L. 108.

I believe, however, that the general practice in this state is that the sheriff or jailer, having a prisoner in custody, conveys him to the proper county for trial, upon the request of the prosecuting officer, without being required so to do by writ of *habeas corpus*. The writ of *habeas corpus* especially provided for in the statutes of this state and of the United States is the high prerogative writ of right granted upon the application of a person illegally imprisoned or in any way restrained of his liberty. We must look to the common law for guidance in the use of the ancillary writ of *habeas corpus* to remove a prisoner to take his trial in the county where the offence was committed. Power to award such writ is conferred in general terms by statute upon courts of the United States.

The powers and duties of a commissioner are co-extensive with the limits of the judicial district in which he is appointed, and he may in the first instance commit a prisoner to the jailer of the county in which the United States court is held, but I think it best for him to commit to the jailer of the county of residence, that the prisoner may have convenient opportunity of procuring sureties or bail. If the commitment be to the last-mentioned jail without any qualification, the commissioner has no further control over the prisoner except to admit him to bail. Under a statute of this state justices of the peace have power to let to bail persons committed to prison charged with crime in all cases where the punishment is not capital; and the recognizance taken must be filed with the clerk of the court of trial. Bat. Rev. c. 33, § 38. Commissioners have similar powers in United States cases.

When a prisoner gives notice that he is prepared and desires to give bail, a commissioner is not required by law to go to the jail to

accept such bail, but he may issue a warrant to the marshal or his deputy to bring the prisoner before him at some convenient place for the purpose of performing the legal duty of accepting bail. There is no express power conferred by statute to issue such warrant, but the power arises by necessary implication. It may be laid down as a general rule that where the law imposes upon a magistrate any duty, or confers upon him power to act in any matter, by implication the power is conferred to issue his warrants to enable him to do that duty and fully exercise that power. A commissioner has no power to commit a defendant to prison, or take him out of prison, except by a written warrant for that purpose.

Section 1030, Rev. St., directs that "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or district attorney." From this grant of express power it seems that in the opinion of congress it did not exist as an implied power, and as the power is only granted to the court and district attorney, the statute may be regarded as restrictive, and intended to exclude all officers of the government not mentioned. Even without this constructive prohibition, commissioners in this state cannot by verbal order commit to prison, as the law requires justices of the peace to commit only by a written *mittimus* setting forth the cause of commitment.

When there is an order of commitment to a county jailer, and the marshal has executed the *mittimus*, he has no further control over the prisoner, and is not responsible for an escape from prison. 9 Cranch, 76. "For certain purposes and to certain intents the state jail, lawfully used by the United States, may be deemed to be the jail of the United States, and that keeper to be the keeper of the United States." *Id.* Section 788, Rev. St., provides that marshals in each state, in executing the laws of the United States, shall have the same powers as sheriffs in executing the laws of the state.

I believe that marshals in this state have usually adopted the practice of the sheriff in removing prisoners to the proper place of trial without applying to a judge for a writ of *habeas corpus*.

I regard this course as an unsafe practice, as an officer in transporting a prisoner ought always to be under the authority and protection of the law by having in his possession due process of law.

I think that the inconvenience of applying to a judge for a writ of *habeas corpus* can be easily obviated by a change in the form of the *mittimus* generally used by commissioners. They can direct the mar-

shal to deliver the prisoner to the jailer of the county of residence, and if bail is not given before the ensuing trial term of the court, then he shall take the prisoner and deliver him to the jailer of the county in which such court is held. I think the first temporary commitment is allowable, as it is for the benefit of the prisoner, and in no way savors of oppression. Such a *mittimus* will afford authority and protection to the marshal in transporting to the place of trial.

As the marshal in this case followed the uniform practice of state sheriffs in transporting prisoners, I think his action is not censurable.

I have directed the clerk of this court to enter of record an order requiring the jailer of this county to keep the prisoners in his jail until they are discharged according to law.

WHITING v. WELLINGTON.

(Circuit Court, D. Massachusetts. January 31, 1882.)

1. REAL ACTION FOR POSSESSION OF LAND.

An action, brought to try the right of possession to a parcel of land under the statute of Massachusetts, (Gen. St. c. 140, § 3,) by a mortgagee against a mortgagor after condition broken, for possession of the premises, where either party may require that a conditional judgment be entered ascertaining the amount of the debt, and awarding possession to the demandant, unless the tenant shall pay the amount so ascertained within two months, is a substitute for an entry upon the land for the purposes of foreclosure, plus a judicial determination of the right of entry.

2. SAME—ASSIGNEE—JURISDICTION.

The circuit court has jurisdiction in a real action for the possession of land brought by an assignee of the note and mortgage.

3. CORPORATIONS—AUTHORITY OF OFFICERS.

Where the treasurer of a savings bank, having the authority to do so, executed an assignment of a mortgage in the name of the bank in due form, and indorsed the note to a *bona fide purchaser*, the title passes, notwithstanding he perpetrated a fraud upon the bank, and converted to his own use the purchase money.

4. SAME—ESTOPPEL IN PAIS.

A corporation is estopped to prove, as against *bona fide* purchasers, either irregularity or fraud upon the part of its officers when acting within their authority.

Real action to recover certain lands in Reading, Massachusetts, tried upon agreed facts. The tenant, Wellington, being seized in fee of the demanded premises mortgaged them in 1874 to the Reading

Savings Bank to secure his note for \$1,800, on demand, with interest. The debt has not been paid, and therefore the condition of the mortgage has been broken. In January, 1879, Nathan P. Pratt, the treasurer of the said savings bank, executed an assignment of the mortgage in the name of the bank, and in due form, and indorsed the note to one Kimball, who paid him the full amount of the note, with interest. As part of the same transaction Kimball bought certain other notes and mortgages, amounting to some five or six thousand dollars. Kimball was acting for the Appleton National Bank, and gave Pratt a receipt, signed by him as president of said national bank, in which he agreed to return and reassign the notes and mortgages upon repayment of the amount paid and interest within six months. The assignments were to Kimball personally.

The Appleton bank has taken no action concerning any of these mortgages. Kimball himself paid that bank the full amount of money advanced for them, and afterwards assigned the note and mortgage of Wellington to the plaintiff, for value, March 25, 1879.

March 19, 1879, the Reading Savings Bank failed and stopped payment, and its affairs are now in the hands of receivers appointed by the supreme court of Massachusetts. It was discovered about this time that Pratt had fraudulently disposed of nearly all the assets of the savings bank, and had concealed his fraud by leaving on the files forged duplicates of the mortgages, and other evidences of debt and title so disposed of. This mortgage was a part of those assets, and Pratt converted to his own use the money which Kimball had paid for it. All this was unknown to the trustees of the bank.

Before and at the time of executing the assignment to Kimball, Pratt was the secretary of said savings bank, and the officer who kept and had charge of its records, and the records of its board of trustees, and in order to prove his authority in the premises he delivered to Kimball a copy of a vote of the trustees as follows:

"At a meeting of the trustees of the Reading Savings Bank, held May 3, 1876, upon motion of C. P. Judd, one of the trustees, *voted*, that the treasurer be authorized to discharge, assign, and release all mortgages belonging to the bank. A true copy. Attest: NATHAN P. PRATT, Secretary."

It is agreed, if competent to be proved against the demandant's objection, that although the certificate was a true copy of the record, the vote, as passed, did not contain the word "assign," but the record had been skilfully altered by Pratt, or with his knowledge, at some time before the assignment to Kimball; and the forgery had not

been discovered by the trustees, who had been changed from time to time by death, resignation, etc.

The trustees had a committee of investment, and transactions like that with Kimball were usually passed upon by that committee before action of the trustees or the treasurer. This was a general usage of savings banks, and Kimball was acquainted with the usages of those institutions. Kimball believed the copy to be a true one, and took the assignment upon the strength of it. The committee of investment kept no record.

J. G. Abbott and S. A. B. Abbott, for demandant.

B. F. Butler, for tenant.

LOWELL, C. J. This action is brought to try the right of possession to the described parcel of land in Reading. Under the statutes of Massachusetts (Gen. St. c. 140, § 3 *et seq.*) a mortgagee may have this action against the mortgagor, after condition broken, for possession of the premises, and either party may require that a conditional judgment shall be entered ascertaining the amount of the debt and awarding possession to the demandant unless the tenant shall pay the amount so ascertained within two months. There is no order to pay the money, and if it is not paid there can be no execution to recover it, but a writ of possession issues, and the tenant has three years from the execution of this writ within which to redeem the premises. This action is a substitute for an entry upon the land for the purposes of foreclosure, plus a judicial determination of the right of entry. If it were a substitute for a bill in equity to foreclose, it is doubtful whether this court could entertain it, because our equitable jurisdiction is independent of any remedies given by the states in the nature of actions at common law for enforcing equitable rights. This is an action to try the right of possession; and if any part of the statute is not in force here it is merely that which gives the tenant an equitable stay for two months on certain terms. The tenant himself has moved for that stay in this case if the title should be found against him, and cannot well complain if it should be *ultra vires*.

Kimball, as a purchaser in good faith without notice, obtained a title by estoppel against the savings bank by virtue of the certificate of its recording officer that a certain vote was found upon its records. I can take judicial notice that such a certificate is the ordinary proof of authority given and received when land is conveyed by corporations. It is, therefore, within the usual power and duty of a recording officer to make such a paper.

If the case turned upon the record itself, somewhat different and, perhaps, more difficult questions might require to be answered; but it is immaterial whether there was any vote or any record. The records were the private *memoranda* of the bank, to which Kimball had no right to demand access. The estoppel arises from the certificate.

The authorities upon estoppels *in pais* are numerous and increasing. In a recent case in England a statute declared that unless certain things were done no shares of a joint-stock company should be issued excepting for cash, and all which should be issued otherwise should be subject to assessment. Shares were issued as "paid up," and were bought by a *bona fide* purchaser. The company and its liquidator were held estopped to prove that the statute had not been followed. *In re British, etc., Co.* 7 Ch. D. 533; S. C. *nom. Burkinshaw v. Nicolls*, 3 App. Cas. 1004. In that case (page 1026) a very able judge says that the doctrine of estoppel *in pais* is a most equitable doctrine, and one without which the law of the country could not be satisfactorily administered:

"When a person makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is, I apprehend, what is meant by estoppel *in pais* or homologation."

This doctrine has been affirmed by the supreme court in a large class of cases where the facts are much more open to public observation than are the votes of a private corporation, in which counties and towns having power to issue bonds upon certain terms and conditions are held estopped to prove, as against *bona fide* purchasers, either irregularity or fraud on the part of their own officers in issuing the bonds, especially if they contain upon their face a certificate that the terms of the law have been complied with. These decisions do not depend upon the negotiable character of the bonds, excepting when there is a question of notice. *Com'rs v. Aspinwall*, 21 How. 539; *Moran v. Com. of Miami*, 2 Black, 722; *Rogers v. Burlington*, 3 Wall. 654; *Grand Chute v. Winegar*, 15 Wall. 355; *Com'rs v. January*, 94 U. S. 202; *San Antonio v. Mehaffy*, 96 U. S. 312; *County of Warren v. Marcy*, 97 U. S. 96. So, if a cashier has authority to certify a check, the bank is estopped to say that his certificate is false in fact. *Merchants' Bank v. State Bank*, 10 Wall. 604. If a company has issued a certificate of shares, it is estopped to prove against one

who has bought the shares in good faith, or even one who has paid one call or assessment to a third person on the strength of the certificate, that it was issued improvidently. *In re Bahia, etc., Co. L. R. 3 Q. B. 584; Hart v. Frontino, etc., Co. L. R. 5 Exch. 111.*

Where the president, who was also transfer agent of a railroad company, issued an immense amount of false and fraudulent certificates of shares, beyond the whole capital, the company, after "a decade of litigation," was held bound to indemnify the honest purchasers. *New York & New Haven R. Co. v. Schuyler*, 34 N. Y. 30. In the present case, the certificate, though false in fact, was genuine; that is, it was given by the recording officer who had the custody of the records, and had a right to give it, and Kimball was justified in acting upon it. The case may likewise rest upon the other familiar principle, that, of two innocent persons, he must suffer who has misled the other. That the recording officer was the same person as the treasurer whose powers he was certifying, was the act of the corporation itself, and cannot affect the operation of the certificate.

The savings bank is not a party to this action, and does not appear to have been called on to defend it; and therefore my decision will not prevent that corporation from taking such measures as it may be advised to take, by bill or otherwise, to establish whatever rights it may have in the premises. If the tenant does not choose to pay the money at once, there may be a considerable time in which such rights can be tested with effect within this jurisdiction. The question for me is whether the demandant has a sufficient legal title to recover possession from the mortgagor himself.

The defence has called attention to the receipt given by Kimball, in which he agrees to reconvey the securities assigned to him upon repayment of the purchase money within six months; and it is contended that Pratt had not even apparent authority to make a pledge, or mortgage, or conditional assignment, and therefore no title whatever passed to Kimball. The case finds that Kimball paid the full face value of the mortgage,—that is, its utmost possible value,—and I do not understand the reasons which induced him to sign this receipt. They are not explained in the statement of facts. It may be that he thought the national bank for which he was acting had no lawful power to buy a mortgage, or it may be that Pratt wished to retain power to repurchase in order to conceal his fraud if his speculations should turn out well. If the latter, there might be some question of *bona fides*; but it is found as a fact that Kimball acted in good faith and without knowledge of fraud. Having in fact bought these mort-

gages, which Pratt had an apparent power to sell, I do not find that his title is rendered void by his giving this unexplained defeasance, so that a *bona fide* purchaser from him, without notice even of the defeasance, can be said to have no title whatever; for that is all that I am called upon to decide at present.

Since the argument, a brief has been handed me, denying the jurisdiction of the court, on the ground that this is a "suit founded on contract in favor of an assignee," and that the assignor could not have maintained it. St. 1875, c. 137, § 1, (18 St. 470.)

I have already shown that this is a real action for possession of land. It is, therefore, not within the prohibition. *Smith v. Kernochen*, 7 How. 198; *Sheldon v. Sill*, 8 How. 441, 449, per *Grier, J.* Besides, the law of 1875 excepts from the prohibition promissory notes negotiable by the law-merchant. It is ingeniously argued that notes were made negotiable by the statute of Anne, and not by the law-merchant. It is true that Lord Holt insisted that promissory notes were not negotiable by the law of England, and that a statute became necessary to put them on the footing of bills of exchange. Judge Story says:

"There was a long struggle in Westminster Hall as to the question whether promissory notes were negotiable or not at the common law; for there could be no doubt that they were by the law-merchant; at least, as recognized upon the continent of Europe. Lord Holt, most strenuously, and with a pride of opinion not altogether reconcilable with his sound sense and generally comprehensive views, maintained the negative." Story, Prom. Notes, § 6.

At present, it is generally admitted that notes which are payable in money at a time certain, to order or bearer, are negotiable by the law merchant. *In re Chandler*, 1 Low. 478, and authorities there cited.

If it be asked why congress mentions the law-merchant, the answer is that they wished to refer to a recognized standard, and did not intend to adopt the statutes of those states which have varied the general law in this respect. Since the statute of 1875, it has been understood that an assignee of those notes which are universally recognized as negotiable, may sue in the circuit courts, though his assignor could not. *Seckel v. Backhaus*, 7 Biss. 354; *Cooper v. Town of Thompson*, 13 Blatchf. 434. The exceptions are of notes under seal, (*Coe v. Cayuga Lake R. Co.* 8 Fed. Rep. 534,) and of those payable in something not money, etc.

Judgment for the demandant.

UNITED STATES *v.* CAMPBELL.

(District Court, S. D. New York. March 6, 1882.)

1. CUSTOMS REVENUE—SURETY ON WAREHOUSE BONDS—LIABILITY—SETTLEMENTS AFTER ONE YEAR CONCLUSIVE.

Where the surety in a warehouse bond in 1872 became bound for the withdrawal of the goods within three years, upon payment of the duties "to which they shall *then be subject*," and the goods were accordingly withdrawn within that time and the duties paid in full as then liquidated, but upon discovery of an error, seven years afterwards, a reliquidation was made showing a deficiency of \$400, for which the surety was thereupon sued on the bond, *held*, that the surety was not liable.

2. SAME—LIQUIDATION BY COLLECTOR FINAL AND CONCLUSIVE.

It is the legal duty of the collector, not of the surety, to ascertain and liquidate the duties. Such liquidation is "final and conclusive" upon all persons interested, unless appealed from, and determines the amount of the legal duties to which goods are "then subject." Withdrawal and payment according to the liquidation existing at the time is a fulfillment of the terms of the bond for the time being, and the surety cannot be held except upon the bond.

3. IMPORTER—LIABILITY OF.

The importer is liable irrespective of the bond, and, as against him, a reliquidation, prior to the act of 1874, might have been made at any time afterwards.

4. SURETY—CONTINUANCE OF RISK.

The necessary continuance of a surety's risk upon such a bond does not exceed the three years named in it, or the additional period until sale of the goods not withdrawn as provided by law. A reliquidation of duties after the lapse of this period is not legal as against him, because it would in effect raise up a new obligation, and involve a continuance of his risk after the expiration of the utmost limit contemplated in his contract, and would, therefore, involve an alteration of his contract in an essential particular.

5. SAME—CONTRACT CONSTRUED—EFFECT OF LIQUIDATION.

The surety's contract being only for the payment of duties upon withdrawal, *semble* liquidation by the government is by the terms of the bond a condition precedent to the payment and withdrawal, and, in the absence of fraud, reliquidation should not be enforced against the surety after a delivery and payment of duties as once liquidated.

6. STATUTE LIMITING TIME FOR LIQUIDATION CONSTRUED.

Section 21 of the act of June 22, 1874, (1 Rev. St. 81,) is designed to apply to past liquidations; and a reliquidation, in the absence of fraud, cannot be made more than one year after settlement, according to a prior liquidation.

7. SAME—ON PRIOR PAYMENTS—STATUTE, WHEN BEGINS TO RUN.

The payment in this case having been made before the passage of the act, the one year named in it commences to run from the time the act took effect.

S. L. Woodford, U. S. Atty., and *Wm. C. Wallace*, for plaintiff.
Hartley & Coleman, for defendant.

BROWN, D. J. The defendant is sued as a surety upon a warehouse bond, executed August 19, 1872, by F. W. Wagner, upon the importation of three cases of optical instruments. The bond recited the importation of the goods by Wagner, the principal, and the entry of the goods for warehousing under the laws of the United States; and the condition was, among other things, "that if, within one year from the date of said original importation, the said goods, wares, and merchandise shall be regularly and lawfully withdrawn from public store or bonded warehouse, on payment of the legal duties and charges to which they shall then be subject, or within three years, on payment of duties and charges, with 10 per cent. additional, etc., then the above obligation to be void." The duties were liquidated at \$310.20 on September 30, 1872. The goods were entered for withdrawal in three portions,—a part on September 10, a part on September 17, and the residue on September 28, 1872. Upon the first two withdrawals before liquidation duties were paid in excess of the whole amount as afterwards liquidated, so that on the last withdrawal no duties appeared to be due, and the residue of the goods was delivered on the basis of that liquidation without any further payment, the withdrawal entry being marked "overpaid."

On March 8, 1880, more than seven years afterwards, an error of nearly \$400 was discovered in the liquidation of September 30, 1872. A "reliquidation" was, therefore, made, and this suit is now brought against the surety only, to recover upon his bond the deficiency as ascertained according to the reliquidation of 1880.

The defendant claims that his obligation was discharged by the payment of the duty in full, as liquidated, within the period prescribed by the bond, and by the regular withdrawal and delivery of the goods upon the faith of that liquidation; and also that under the act of June 22, 1874, (1 Supp. to Rev. St. p. 81, § 21,) no reliquidation of this entry could be made more than one year after the passage of that act.

The error in the liquidation of 1872 was of such a nature as to have been easily discovered upon a scrutiny of the entry and of the computation made upon it. But it does not appear that the surety in the bond, who is alone sued in this action, had anything to do with the liquidation, or that he is chargeable with any knowledge of the error, or of the nature or cause of it. As regards him, therefore, the case must be determined upon the general authority of the collector to make a reliquidation which shall be binding upon a surety after the

goods have been once regularly withdrawn and the duties paid as liquidated at the time of withdrawal, and after the lapse of the period of three years specified on the bond for payment.

The question here presented could not arise as regards the importer himself, for he is liable for any deficiency in payment of the lawful duties, irrespective of the withdrawal of the goods, and, prior to the act of 1874, reliquidation as against him might be had at any subsequent time, and suit brought against him for the deficiency. *U. S. v. Phelps*, 17 Blatchf. 312, 316; *Dumont v. U. S.* 98 U. S. 142, 144; *U. S. v. Cousinery*, 7 Ben. 251; *Westray v. U. S.* 18 Wall. 322.

The situation of the surety is different. His liability is limited to the conditions of the bond itself. *U. S. v. Dumont*, 98 U. S. 142; *Miller v. Stewart*, 9 Wheat. 681; *U. S. v. Boecker*, 21 Wall. 652*u*. These conditions are that the bond should be "void" if in one year the goods should be regularly and lawfully withdrawn upon payment of the duties and charges to which they shall *then be subject*, or if they should be so withdrawn within three years, on payment of such duties and charges, and 10 per cent. additional." These goods were regularly and lawfully withdrawn within one year, *i. e.*, in the usual and customary manner, upon payment of the duties as liquidated at that time.

The "legal duties" to which the goods were "then subject" were, in legal contemplation, the duties as then liquidated and fixed by the collector. He and those under him are the persons charged by law with the duty of making the necessary examination of the goods, and of determining "the rate and the amount of duties." By the act of June 30, 1864, under which this entry was made, it is declared that "the decision of the collector as to the rate and *amount* of duties shall be final and conclusive against all persons interested therein, unless the owner appeal, etc., within 10 days after the ascertainment and liquidation of the duties by the proper officers," and that "such goods shall be *liable to duty accordingly*, any act of congress notwithstanding," etc. 13 St. at Large, c. 171 p. 214, § 14.

In the case of *U. S. v. Cousinery*, 7 Ben. 255, which was approved by the chief justice in *Watt v. U. S.* 15 Blatchf. 33, *Blatchford*, C. J., says, in reference to this clause of the statute: "This means that the decision (*i. e.*, of the collector, if there be no appeal, or of the secretary, if there be an appeal) is made the test and standard of the payment of the duties to the government, even if there be an act of congress which seems to prescribe something different from the decision." Page 257. And in the same case he also says: "The amount fixed by

the collector is by the statute made the duty for the purpose of collecting it as a duty."

In *Lawrence v. Caswell*, 13 How. 488, Taney, C. J., says, in reference to an excessive liquidation: "Where no protest is made, the duties (*i. e.*, the excessive duties) are not illegally exacted in the legal sense of the term, but paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question." To the same effect is *Nichols v. U. S.* 7 Wall. 122, 127.

In any suit brought by the United States upon this bond, and upon the very clause now in question, to recover the amount of duty as ascertained by the original liquidation, that liquidation would be final and conclusive, and no further inquiry permitted into the rate or amount of duty. *U. S. v. Cousinery*, 7 Ben. 251; *Watt v. U. S.* 15 Blatchf. 33; *Westray v. U. S.* 18 Wall. 322; *U. S. v. Phelps*, 17 Blatchf. 317. The statute, in declaring that "the goods shall be liable to duty accordingly," *i. e.*, according to the liquidation then made, "any act of congress notwithstanding," makes the liquidation the measure of the amount of the "legal duties," and payment in accordance with this liquidation is a payment of the "legal duties to which the goods are then subject," and is, for the time being at least, a perfect performance of the condition of the bond, and consequently a discharge of the surety.

But it is claimed that a subsequent liquidation vacates the former liquidation, and determines the true amount of "legal duties" to which the goods were originally subject, and that, consequently, under the new liquidation, the condition of the bond is not fulfilled. This claim, if valid, would create against the surety a liability for his principal long after the period of the surety's risk contemplated by the bond had expired, when the security in the hands of the government was gone, and when the lapse of time might have produced great changes in the surety's means of indemnity against his principal. Such a reliquidation, made after the delivery of the goods and after the expiration of the three years prescribed by the bond, cannot, in my judgment, be enforced against the surety, because it would in effect prolong his risk indefinitely, and postpone his means of resort to his principal for indemnity beyond the period stipulated in the bond, and would be, therefore, in its legal effect, an alteration of the contract in an essential particular, viz., as respects the duration of his risk.

It is a well-settled condition of the obligation of a surety that the creditor shall do no act whereby the risk of the surety would be in-

creased beyond that which he has expressly assumed by his contract. If the creditor do so, the surety is thereby discharged. A postponement of the time of payment discharges a surety, because otherwise it would continue the surety's risk beyond the stipulated period; it prevents him from paying the debt at the time agreed on, and from proceeding at once for his indemnity against his principal, or against any other securities held for the debt. These general principles of the law of suretyship, and the rule that a surety's obligation is limited to his contract *strictissimi juris*, apply to contracts with the United States the same as to those with individuals. *Miller v. Stewart*, 9 Wheat. 681, 703; *U. S. v. Hodge*, 6 How. 279, 283; *U. S. v. Hillegas*, 3 Wash. C. C. 70; *U. S. v. Tillotson*, 1 Paine, C. C. 305; *U. S. v. Bostwick*, 94 U. S. 53, 66.

By the terms of this bond the defendant had the right, as surety, to determine his risk by payment of the "legal duties" at the end of three years, or so soon as any deficiency should be ascertained under the provisions of law for the sale by government of any goods still on hand, and immediately thereafter to proceed for indemnity against his principal. That was the extreme limit of time during which the surety's right to proceed for his indemnity against his principal could, under this contract, be suspended. That was the utmost duration of his risk to which, by his contract, he had assented. To uphold a claim against the surety based upon a reliquidation made after seven years would be postponing his right to proceed against his principal for indemnity, and extending the period of his risk to that length of time, instead of three years only, as provided by the bond, with the additional period necessary for a sale of any goods not withdrawn. *U. S. v. De Visser*, 10 FED. REP. 642.

The government cannot increase or prolong this risk indirectly through a reliquidation long after the prescribed period of credit has passed, any more than it could do so directly by an express extension of the time of payment. The result of both is the same. The liquidation of the duties was an essential condition precedent to their final payment. The obligation to liquidate and fix the amount of duties devolved by law upon the collector. The surety is not legally chargeable with any duty in that respect. It is neither any part of his contract, nor devolved on him by law; and the liquidation, when made by the officers charged with the duty of making it, was "final and conclusive" upon him, and he had no power to change it. Until reliquidation the surety could not have paid any increased duties, and then have recovered the amount so paid in any action against his

principal. The original liquidation, which was "conclusive upon all persons in interest," would have precluded him from any such recovery. Nor can the surety be charged with any fault in not procuring an earlier reliquidation, or a correction of an error of which he is not shown to have had any knowledge. As the liquidation must precede payment of the duties, the bond itself imports an obligation upon the government to make this liquidation before the expiration of the three years' term of credit to the importer, which is the utmost limit of the surety's stipulated risk; and, if reliquidation is not made within that period, it cannot be asserted afterwards against the surety, because incompatible with the legal limitation of his risk which the bond itself imports.

Again, the terms of the bond, which provide that the goods shall be "withdrawn upon payment of the duties," necessarily import that the withdrawal and the payment are to be concurrent acts. The obligation of the government to make the liquidation before withdrawal is, therefore, as much a part of the contract as the obligation of the bondsmen to pay the duties upon withdrawal; the former is a necessary condition of the latter. The provision for payment "upon withdrawal" also enures directly to the benefit and to the safety of the surety, and the liquidation having been made, and the goods delivered over in regular course upon payment of the amount so liquidated, the government would seem to be estopped from any subsequent reliquidation to the prejudice of the surety. Such would manifestly be the result as between individuals; and in its express contracts with its citizens the United States, it is said by the chief justice in *Bostwick v. U. S.* 94 U. S. 53, 66, "are controlled by the same laws that govern the citizen in that behalf. All obligation which would be implied against citizens in the same circumstances will be implied against them." *McKnight v. U. S.* 98 U. S. 179, 186; *U. S. v. Barker*, 12 Wheat. 558; *Cooke v. U. S.* 91 U. S. 396.

However this may be, it seems to me clear that the right to reliquidate is not an absolute right. It is not conferred by any statutory authority. It is a privilege which has been sustained by the courts as against the importer, who is liable, irrespective of the bond, for whatever duties ought to have been fixed and paid by him. The surety is liable upon the bond only. The right to reliquidate cannot be asserted, as against him, contrary to the implied terms of the bond; and any reliquidation by the government must, therefore, be made within the limited period of his risk as stipulated in the contract.

Second. The claim of the United States would also seem to be barred by the limitation prescribed by the act of June 22, 1874. Section 21 of that act (1 Supp. Rev. St. 81) shows, by its language, that it was designed to apply to past liquidations. It declares "that whenever any goods, etc., *shall have been entered*, etc., and whenever any duties upon any imported goods, etc., *shall have been liquidated* and paid, etc., such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud, etc., be final and conclusive on all parties."

At the time of the passage of this act the government had, under former decisions, been allowed to reliquidate the duties against the importer, without any limitation of time. Such reliquidation was a necessary preliminary to any remedy for deficiency under a preceding erroneous liquidation. This section of the act of 1874 is, therefore, in the nature of a statute of limitations. It applies to the government, and limits its remedies, after settlement, to a period within one year from the date of entry. *U. S. v. Phelps*, 17 Blatchf. 312, 316. Such statutes, where the prohibitory language is general, as in this case, apply to past as well as future transactions, unless the contrary intent is manifest. *Sohn v. Waterson*, 17 Wall. 596. The intent of section 21 of this act to include past transactions seems clear from the words above quoted. But inasmuch as "one year from the date of entry" had already elapsed at the time the act was passed, the rule of construction, as sustained in the case last cited, must be that the time of limitation shall "commence when the cause of action is first subjected to the operation of the statute." Upon this construction the government had but one year after the act of June 22, 1874, took effect, in which to make its reliquidation and commence suit.

It is urged that section 26 of that act declares that "nothing herein contained shall affect existing rights of the United States." But it is impossible to hold, as it seems to me, that the effect of this saving clause is to nullify every specific clause in the act, when a right of the United States is affected. The act relates to several different subjects, and many of its provisions modify, more or less, rights formerly existing. Section 16 expressly applies to suits "now pending," and the existing rights of the United States in such suits were greatly affected thereby through a submission to the jury of the question of actual intent to defraud. "Acts and parts of acts inconsistent with the provisions of this act are repealed;" and then comes the saving clause as to "existing rights." The general words of this

clause must be held to be subordinate to the specific provisions of particular sections, which show a manifest intent to apply to past transactions. The purpose of that clause was, I think, simply to prevent any existing right of the United States from being wholly cut off, or affected otherwise than expressly provided. Under the construction above adopted, as in *Sohn v. Waterson*, 17 Wall. 596, any existing right to reliquidate the duties would not be cut off; it would remain unaffected for the full period of one year thereafter, but no longer; and that, I think, is all that the act designed.

The defendant is, therefore, entitled to judgment.

See *Barney v. Watson*, 92 U. S. 449; *Ullman v. Murphy*, 11 Blatchf. 354; *Refund of Customs Duties*, 15 Op. Atty. Gen. 121.

UNITED STATES v. KRUM, Adm'r, and others.*

(Circuit Court, E. D. Missouri. March 13, 1882.)

1. INTERNAL REVENUE LAW — COLLECTOR — PAYING MONEY UNDER DECREE OF COURT.

Where a decree of forfeiture is rendered in a suit for a breach of the internal revenue law, and the defendant, pursuant to a compromise with the government, pays a sum of money into court, and A. and B. are adjudged entitled to a portion of the fund paid as informers, and the court makes a final order of distribution, and issues checks to C., collector of internal revenue of the district, and no appeal is taken, and C. pays A. and B. the amounts to which they have been held entitled, he cannot be held liable on his official bond for the amounts so paid, whether the informers are legally entitled thereto or not.

2. SAME—INFORMER.

Where money is paid into court under circumstances like those above stated, the right of the informers to their proportion of the sum paid is not affected by the fact that a part of such sum is designated to cover taxes.

William A. Bliss, for the United States.

William Patrick, for defendants.

TREAT, D. J. This is a suit on the official bond of the late Charles W. Ford, formerly collector of internal revenue, to recover three several sums of money alleged to have been received by him, and to be due to the United States.

It appears that three several suits *in rem* were instituted by the United States, in the United States district court, for the forfeiture of certain distilled spirits, and such proceedings therein had as

*Reported by B. F. Rex, Esq., of the St. Louis bar.

resulted in decrees of forfeiture. Pursuant to the terms of compromise, the sum of money required was paid into the registry of the court. In two of the cases the court had adjudged Able and Hunter, respectively, to be informers, and consequently entitled, under the law and regulations then existing, to portions of the proceeds recovered. Final orders of distribution were made, and checks issued to the collector accordingly. He paid to the informers their respective shares, under the circumstances stated, and the sums by him so paid are two of those now sued for.

At a term of the district court subsequent to that in which it had finally disposed of those cases, application was made by the collector, at the instance of the commissioner, for leave to pay back into the registry the sums received, with a view to securing different or modified decrees. The court held that it could not thus change the final decrees entered of a former term.

It seems that the sum fixed upon for compromise was based partly on penalties and partly on taxes due; and therefore the commissioner was of opinion that the informers should receive nothing from that part of the gross sum paid, which was designed to cover taxes. The court, in its action, treated the fund in the registry as so much recovered from the forfeitures named. The suits were not for taxes, and what might or might not have induced the compromise could not alter the law or the statutes of the cases. The money was paid in those suits, and must be distributed as the law in such cases required. As had been well settled, the informers could not be deprived of their portions of the proceeds.

This suit is based, not only on a different theory, but also on the hypothesis that those final decrees made in 1870, of the district court, furnish no protection to the collector who acted under them. This court holds otherwise. The decrees of the district court were subject to review by the appellate court; but no action therefor was ever had. Hence there can be no recovery by the United States for the sums so paid to the informers.

As to the third sum in dispute there is no valid defence, to-wit, \$2,710.80; but it is entitled to a credit of \$582.44.

Judgment, therefore, will be for \$2,127.36, with interest at the rate of 6 per cent. per year from the date of the demand on the administrator, to-wit, December 13, 1878.

VERMONT FARM MACHINE CO. v. CONVERSE.

(Circuit Court, D. Connecticut. February 3, 1882.)

1. REOPENING CAUSE—GROUNDS FOR, INSUFFICIENT.

A motion to "reopen" a cause, and allow defendant to take additional testimony, was denied; the defendant not stating that the evidence was not accessible at the trial, or that it was not then known to him, or that it is material.

On motion to reopen the cause and allow additional testimony to be taken.

W. E. Simonds, for plaintiff.

Charles B. Tilden, for defendant.

SHIPMAN, D. J. This is a motion to "reopen" the cause and allow the defendant to take additional testimony upon 16 points. The testimony seems by the record to have been closed on November 25, 1881, when the plaintiff's rebutting testimony was taken. The defendant did not then suggest that he was intending to reply. He does not now state that the evidence was not then as accessible and as well known to him as it is now, or that it is material. He says that the statements of the plaintiff which it is desired to answer "consist for the most part of new matter, not yet set forth or alluded to in the *prima facie* case made by the plaintiff, and not being in reply to anything set up by the defendant," and that the testimony "tends to injure him and prejudice his rights in the present suit."

I am of opinion that when the plaintiff closed his rebutting testimony the defendant did not think that this new matter required any reply or was of importance. Subsequent reflection leads him to fear that, if it is unanswered, it may prejudice his case, but he does not think that it will injure him, or that it is of importance.

If the case is opened, and the defendant is allowed to take testimony upon 16 points which are not claimed to be material to the case, I think that the present compact record would become needlessly voluminous, and that needless expense would be imposed upon both parties.

The motion is denied.

JACOBS and others v. OUSATONIC WATER CO.

(Circuit Court, D. Connecticut. January 5, 1882.)

I. FINDINGS—AFFIRMANCE ON WRIT OF ERROR.

Where the finding of facts by the district judge is warranted by the proofs, and the new testimony put in this court does not substantially change the facts found, *held*, that the libel be dismissed, with costs.

On Writ of Error.

A. S. Cushman, for libellants.

David Torrance, for respondents.

BLATCHFORD, C. J. The finding of facts by the district judge in his decision in this case is warranted by the proofs, and the new testimony put in this court does not substantially change the facts so found. The conclusion that on those facts the respondent is not liable must follow.

The libel alleges that the schooner hauled up to and occupied the berth at the derrick provided for the unloading of her cargo of coal, and at the place where she had on previous voyages safely laid for the purpose of discharging her cargoes, and that the respondent was bound to keep that berth safe, but had, by dredging, rendered it unsafe, without notice to or knowledge by the libellants or the master. The master moored where he did without instructions or directions from any one in the employ of the respondent, and without the knowledge of any one in the employ of the respondent. The berth at the wharf, for the distance the respondent was bound to excavate, and had excavated, was safe, and would have been safe for this schooner. Her stern extended below the lower end of the wharf to a distance at least one-third greater, and from that to one-half greater, than ever before. The depth of water at her stern was so little that if it had been ascertained by her master that fact would necessarily have indicated danger to him in lying there over low tide, even with the depth at the front of the wharf such as it was before the additional excavation was made. Movement of his stern outwardly and securing it there would have insured safety as it was.

The libel is dismissed, with the costs of the district court, taxed at \$130.70, and with costs to the respondent in this court.

GAYLORD v. COPES.

(Circuit Court, E. D. Louisiana. November 25, 1881.)

I. PLEADING—PRESCRIPTION—WHEN NOT AVAILABLE AGAINST DEBT.

The exception of prescription will not avail against a debt in a case where a debt was paid in stolen bonds of a railroad company, and by reason of the theft the payee had been evicted, his title failing, and his bonds rejected

On Exceptions to Petition.

Plaintiff alleged that on the ninth of August, 1865, defendant, being indebted to plaintiff, gave him in payment thereof five first-mortgage construction bonds of the Vicksburgh, Shreveport & Texas Railroad Company; that in May, 1879, in a certain suit of *Jackson v. Vicksburgh, Shreveport & Texas R. Co. and others*, which had been brought on behalf of all the holders of similar bonds issued by said company, it was finally decided by the supreme court of the United States (*Vicksburgh, S. & T. R. Co. v. Jackson*, 99 U. S. 513,) that certain of said bonds, those given by the defendant to plaintiff among the number, were not genuine obligations of said railroad company, and had never been issued, but had been carried off by persons belonging to, or taking advantage of, a raid upon the town of Monroe, Louisiana, during the late war, and that neither the persons so taking them, nor their transferees, had acquired any title thereto. Plaintiff thereupon tendered the bonds back to defendant, and demanded the payment of the original amount of the debt for which defendant gave the bonds, which defendant refused. Defendant pleaded the prescription of five and ten years.

Kennard, Howe & Prentiss, for plaintiff.

H. N. Ogden, for defendant.

PARDEE, C. J. The exception of prescription in this case is submitted on the allegations of the petition. The allegations of the petition show that the bonds in question were given in payment of a debt; that they were stolen; and that by reason thereof the petitioner has been evicted, his title failing, and his bonds being rejected. This eviction is charged as taking place in 1879. On this state of facts, the prescription of five or ten years is not acquired. Rev. Civil Code, 2659. See *Babin v. Winchester*, 7 La. 470.

The exception, therefore, should be overruled. On the trial, should such a different state of facts be shown as to justify the exception of prescription, it can be renewed.

CAVENDER v. CAVENDER.

(Circuit Court, E. D. Missouri. February 2^d, 1882.)

1. COSTS—CLERK'S FEES.

The clerk may collect his costs as they accrue, irrespective of the final result.

2. SAME.

A transcript of a record on appeal, or writ of error, is only a *copy*, and the clerk can charge therefor only 10 cents per folio.

3. SAME—EXPENSES.

For binding or express charges the clerk may charge the *reasonable, actual* cost to him.

4. SAME.

The clerk cannot tax costs for drawing a bond and its approval when it was drawn by counsel and approved by the court.

5. SAME—FOLIO, WHAT.

An original entry, distinct from all others, though less than a folio, (100 words,) is to be charged as a full folio. Appellant must pay costs incident to his appeal.

Motion to retax clerk's costs for a transcript, on appeal to the supreme court. The clerk had collected 15 cents per folio for a transcript, and a like rate for an appeal bond drawn by the attorneys, and also a fee for approval of the bond in open court by the judges.

Lucien Eaton, for the motion.

M. M. Price, clerk, *pro se*.

TREAT, D. J. The clerk has a right to demand payment of his costs as they are earned, without waiting for the final determination of the suit on appeal or otherwise. This, as has been repeatedly decided in this circuit, rests on the controlling fact that he must answer to the United States for fees earned, as if collected; and, consequently, if he chooses to give credit therefor, he is none the less answerable than if the cash were received. Hence he has a legal right to exact payment for work done as it progresses, and is not bound to forward or deliver the results of his work until they are paid for.

1. Has the clerk the right to charge 15 cents per folio for transcripts of a record, or only 10 cents per folio? The only provision of the United States Statutes under which this class of clerical work falls is in these words: "For a copy of any entry or record, or of any paper on file, for each folio, 10 cents." There are other provisions as to the original entries for which 15 cents per folio are chargeable. Rev. St. § 828.

The question, therefore, is whether "transcripts" of records for the supreme court fall within the one or other provisions. It may be, as urged, that the accounting officers recognize the distinction claimed, viz., that "transcripts" are to be considered as falling within the rule as to the original entries; still this court must decide the point for itself. What is a transcript forwarded to the supreme court but a "copy" of something ordered by the court in a case at law, or in equity, to be so forwarded? There is no new or original matter to be thus included. The case is closed here, and a copy of what appears is all that can be embraced in the "transcript." Hence, the exception as to that charge is well taken, and the fee bill as to that item will be reduced from 15 cents per folio to 10 cents per folio.

2. The next exception as to the number of folios has no foundation in fact, and will be overruled.

3. As to binding and express charges the clerk may charge what the same reasonably cost. It does not appear that he has charged otherwise. This exception is overruled.

4. The fee-bill does not disclose what is charged for drawing a bond. It appears that the bond in this case was not drawn by the clerk, and, consequently, he cannot charge for what he did not do. The bond was drawn by appellant's counsel and approved by the court. The charge by the clerk should therefore be for an entry for the filing of the same, and for filing and for an entry of the approval of the same by the court.

The general question embraced in the last exception, viz., that the defendant who has taken an appeal cannot be compelled to pay in *advance* of the final decision the costs incident to an appeal, is overruled, for the reason stated at the beginning of this opinion. The fee-bill will be restated according to the views here expressed.

It should be remarked that when an original entry of an order is made, though less than a folio, it is chargeable as a folio, each entry of a kind standing by itself, distinct from all others.

GUNTHER v. LIVERPOOL, LONDON & GLOBE INS. Co.

(*Circuit Court, E. D. New York. March 7, 1882.*)

1. TAXATION OF COSTS ON NEW TRIAL DENIED.

On trial of an action removed from the state court to the United States circuit court, under the act of 1875, a verdict for plaintiff for \$29,997 was rendered, and a motion for new trial was argued and denied. On taxation of costs thereafter, the clerk allowed interest on the amount of the verdict from the day of rendition, and an item for "copy of coroner's record" used in evidence, and disallowed items of stenographer's charges and for service of summons in the state court; from which taxation both parties appealed to the court. *Held*, that the act of 1853 (section 828, Rev. St.) is not exclusive, and as the item of interest on amount of verdict is within the equity of section 996, it is taxable; that the items for service of summons and copy of coroner's record might be allowed, and the item for stenographer's charge was properly disallowed, no order of court therefor having been made or consent to its taxation given.

Geo. H. Forster, for plaintiff.

Butler, Stillman & Hubbard, for defendant.

BENEDICT, D. J. Prior to the enactment of the fee bill of 1853 the actual disbursements necessarily incurred and deemed reasonable were allowed in the taxation of costs in accordance with the provision in the laws of the state (2 Rev. St. 727, 3d Ed.) by virtue of the rules of court. See 1 Blatchf. 652. Such is the law now unless modified by the fee bill of 1853. That fee bill, in terms, relates to compensation of the officers named, but does contain a provision (now section 983, Rev. St.) allowing clerks to include in the judgment fees for exemplifications and copies of papers necessarily obtained for use on the trial, when taxed by the judge or clerk. This provision has by some been considered as exclusive, and to forbid the taxation of any item of disbursements other than fees paid for exemplification and copies of papers, but in this circuit a different understanding has prevailed, and actual disbursements necessarily incurred have been taxed. See *Hussey v. Bradley*, 5 Blatchf. 134; *Dennis v. Eddy*, 12 Blatchf. 195. The rule for this circuit, as laid down in the cases referred to, will permit in this case the taxation of the item of one dollar paid for serving the summons by which the action was commenced in the state court. It was a necessary disbursement actually made in the cause, and is now taxable by this court, by virtue of the rules of the court, as it would have been prior to the fee bill of 1853. The sum paid the stenographer by the plaintiff to obtain a copy of his minutes of the testimony given on the trial cannot be taxed, be-

cause the employment of a stenographer was not directed by the court, and there was no consent to the insertion of any part of the stenographer's charges in the bill of costs.

The item of interest on the judgment from the day of the rendition of the verdict to the day of entry of the judgment, amounting to some \$500, may be allowed. The delay was caused by a stay of proceedings during the pending of a motion for a new trial. This delay should not be at the plaintiff's expense. The payment of interest meanwhile might properly be deemed a condition attached to the stay; or, if not, an entry of the judgment as of the date of entering the motion for new trial might, if necessary to avoid damages to the plaintiff, be permitted; but I consider the item of interest on a verdict within the equity of the statute, (section 996, Rev. St.,) and for that reason taxable. *Nat. Bank v. Mechanics' Nat. Bank*, 94 U. S. 439. See, also, *Dowell v. Griswold*, 5 Sawy. 24.

The clerk will, therefore, allow the item of one dollar paid for serving the summons, will reject the item of cash paid stenographer, and will allow interest on the amount of the verdict from the date of its rendition to the date of entering up the judgment.

This sum paid for the copy of the record of the coroner's inquest may also be allowed.

SEALE, Assignee, etc., v. VAIDEN, HAWKINS & ROBERTS and others.

(District Court, N. D. Mississippi. December Term, 1881.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—UNLAWFUL PREFERENCE.

Where, in a deed of trust, the trustee is directed, *firstly*, to pay all the costs and expenses incidental to its execution; *secondly*, a note executed by the grantors to their attorneys; *thirdly*, to pay all the creditors who might apply within 30 days, 33½ per cent. on their debts, provided they would release the balance of their demands; *fourthly*, to pay all other creditors, who should apply within 60 days after said assignment was made, the amount due them in full, if there should be money sufficient for that purpose, and if not then a *pro rata* share to each, provided they should release the remainder of their debts, if any; *fifthly*, to all other creditors the amount due them, out of any surplus which may remain after the before-mentioned payments,—is fraudulent and void as against non-assenting creditors.

2. SAME—RIGHTS OF NON-ASSENTING CREDITORS.

When an assignment is made in which a participation in the assets is dependent upon entering a release of the remainder of the debt due, and there is no provision made for a distribution of the surplus among non-assenting creditors, such assignment is *per se* fraudulent and void.

3. CREDITORS, WHEN NOT BOUND.

Non-assenting creditors, not present at the time the deed of trust was executed, are in no way bound by the agreement of the assenting creditors to the release of a portion of their debts, in an assignment made by the debtor for their benefit.

HILL, D. J. This bill was filed by complainant against defendants and others, creditors of Abernathy & McCarley, in the chancery court of Chickasaw county, for the purpose of enjoining the defendants as creditors from proceeding by attachment to recover their debts out of the property conveyed by said debtors to complainant by trust deed exhibited with the bill. An injunction as prayed for was granted by the circuit judge of said district. The cause is removed to this court under the act of congress of 1875. The defendants Vaiden Hawkins & Roberts sued out an attachment against said Abernathy & McCarley in the circuit court of Chickasaw county, which had also been removed to this court, and is now pending. Said Vaiden, Hawkins & Roberts move in this court to dissolve said injunction so far as it relates to those attachment suits against said Abernathy & McCarley, upon the ground as alleged that, as to them, the assignment under which complainant holds is fraudulent and void. And this is the only question now presented for decision.

The provisions of the trust deed which it is alleged renders it fraudulent and void, are those relating to the order of distribution of the assets of said assigned property, and the conditions annexed to its reception by creditors. The trustee is directed—*First*, to pay all the costs and expenses of executing the trust; *secondly*, a note executed by the grantors to their attorneys for \$500; *thirdly*, to pay to all the creditors who might apply within 30 days, 33 $\frac{1}{3}$ per cent. on their debts, provided they would release the balance of their demands; *fourthly*, to pay all other creditors who should apply within 60 days after said assignment was made, the amount due then in full, if there should be money sufficient for that purpose, and if not, then a *pro rata* share to each, provided they should release the remainder of their debts, if any; *fifthly*, to all other creditors the amount due them, and of any surplus which might remain after the before-mentioned payments.

The schedule annexed to the trust deed, and which, for the consideration of the question now for decision, may be regarded as part of the conveyance, states the liabilities at \$13,566.40, and the assets at \$9,552.90; but in these estimates are embraced cotton in the hands of Vaiden, Hawkins & Roberts, estimated at \$480, and in the hands

of Gardner, Gates & Co., valued at \$1,680; and that the indebtedness to said Gardner, Gates & Co. is \$3,177.86, and that to Vaiden, Hawkins & Co. \$1,889.12. It is clear that these creditors had a lien upon the cotton in their hands, and a right to apply the proceeds to the payment of their accounts, which, when done, would reduce the amount of assets to \$7,392.90, and would reduce the liabilities to \$11,456.40. Experience has shown, until it is almost a matter of judicial knowledge, that a remnant of a stock of goods and of debts can rarely, if ever, be made to realize more than half their nominal amount. The trust deed provides that the sum of \$500 should be paid in full to the attorneys of the grantors; also the expenses of executing the trust, including \$50 per month to the assignee. These expenses, at the least, will amount to \$500, making in all at least \$1,000 to be paid before any other creditors. The value of the assets, if placed at 50 cents on the dollar, would amount to \$3,696.45; but, according to the proof of the assignee, they realized about \$4,000, which shows better success than usual.

Deduct from this sum \$1,000, would leave \$3,000 for creditors. The proof is that five-sixths of the creditors in amount were present, and agreed to the assignment and to the reception of $33\frac{1}{3}$ per cent. of the amount due them. This was done before the assignment was made. Thirty-three and one-third per cent. on the amount due these creditors, as shown by the schedules, amounts to the sum of \$3,182.15, which would absorb all the remaining assets and leave nothing. So far as it relates to these accepting creditors there can be no doubt that the assignment is valid and binding, especially as they agreed to it before it was made, and before the grantor had parted with the assets and property conveyed.

The question is as to whether or not it is valid as to the non-assenting creditors, of whom Vaiden, Hawkins & Roberts compose a part. It is considered that when an assignment of this character is made, in which a participation in the assets is dependent upon entering a release of the remainder of the debt due, and there is no provision made for a distribution of the surplus among the non-assenting creditors, that such conveyance would *per se* be held fraudulent and void; but it is contended that the provision made for the third class of creditors avoids this result. Complainant's counsel, to sustain this position, rely upon the case of *Spalding v. Strong*, 37 N. Y. 135, and 38 N. Y. 10.

I am of opinion that the rule laid down in those cases goes to the verge in upholding these assignments; but in these cases the assignment is held valid because of the contract between the parties, and as a mode of preference by classes. I doubt that the court in these cases would have held the assignment valid, had it been shown upon the face of the assignment and schedule annexed to it, to a moral certainty, as in this case, that nothing would be left to the non-assenting creditors. The vice of the release demanded cannot be cured by a contingency which, it is apparent from the face of the conveyance, schedule, and proof, can never take place.

Vaiden, Hawkins & Roberts were not present when the assignment was agreed to by the assenting creditors, and are in no way bound by what they did, when we consider the creditors who, in amount, agreed to the assignment, and consequently to its terms, and the largest sum which the assets could reasonably be expected to produce. It was in effect saying, upon the part of the grantors, to their non-assenting creditors: Your participation in the property and assets conveyed, depends upon your releasing to us two-thirds or the remainder of your just demand against us. This is a demand not sustained by law, and which renders this conveyance fraudulent and void as against Vaiden, Hawkins & Roberts, the defendants who move to dissolve the injunction.

There has been produced no ruling by the supreme court of the United States upholding such an assignment as the one under consideration. The rulings upon assignments containing provisions for a release of the remainder of the creditor's debt, so far as they have come before the supreme court of this state, have been adverse to the validity of such assignments; so that this court is left free to pass upon the question presented upon its intrinsic merits. A careful consideration of the arguments and authorities cited by the learned counsel who have argued this case has led me to the conclusion above stated, and that is that, from the face of the conveyance, schedules, and the proof read in evidence by the complainant, the trust deed must be held fraudulent and void, and as conveying no title as against Vaiden, Hawkins & Roberts, and that as to them the injunction granted by the circuit judge should be dissolved, and they permitted to proceed with their attachment suit as though said conveyance had never been made. And it is so ordered, but only as to these parties; as to all others, the cause will remain as though this order had not been made.

NEW YORK GRAPE SUGAR CO. v. AMERICAN GRAPE SUGAR CO. and others.

(Circuit Court, N. D. New York. March 3, 1882.)

1. PATENTS—WANT OF NOVELTY.

The employment of sheet metal as a lining for the bottom of a vessel to contain liquids involves no invention.

2. SAME—PRELIMINARY INJUNCTION.

Where the questions as to the complainant's rights under his patent are doubtful, they will not be entertained on a motion for a preliminary injunction.

3. SAME—WHEN INJUNCTION GRANTED.

When the validity of the patent is not assailed, and the proof of infringement is clear, the court will grant a preliminary injunction.

4. PROVISIONAL INJUNCTION.

Where the defendants are entirely responsible, and complainant can be adequately compensated, irreparable damage is an indispensable element in an application for a provisional injunction.

Dickerson & Dickerson, for complainant. *Roscoe Conkling*, of counsel.

Bowen, Rogers & Locke, for defendants. *Geo. Harding*, of counsel.

WALLACE, D. J. The complainant moves for a preliminary injunction to restrain the defendants from infringing four patents owned by complainant relating to improvements in the apparatus for manufacturing starch. Of these patents the first was issued January 14, 1868, to John A. Owens, and was reissued to Thomas A. Jebb and William T. Jebb, May 31, 1881, for a combination of an agitator and vibrating screen or sieve; the second was issued May 26, 1868, to John A. Owens, for an improvement in starch trays, which consists in forming the bottoms of sheet metal; the third was issued September 8, 1868, to J. J. Gilbert, as assignee of Colgate Gilbert, for a bolting sieve vibrated, supported, and fed as described, and the constituent parts thereof; and the fourth was issued to Colgate Gilbert, April 15, 1873, for an adjustable support to a starch separator. Except as to the second patent, the defendants have entirely failed to impugn the right of the complainant to an injunction, if this were a final hearing instead of a motion for a preliminary injunction.

As to the second patent, sufficient appears to raise doubts as to the patentable novelty of the improvement described. It would seem that the employment of sheet metal as a lining for the bottom of a starch tray involves no invention. The bottom had been made of wood, and, undoubtedly, when lined with lead or copper or galvan-

ized iron, would be more durable and more easily cleaned. But it is within common knowledge that such linings had been used analogously in many other vessels made to contain liquids, because of these advantages. Such a lining had also been employed, as described in the Belgian patent of Heidt, for forming the bottom of a trough or channel used for the deposition of starch, in the place of the tray used by Owen. Inasmuch as the court will not decide doubtful questions as to complainant's right upon a motion for a preliminary injunction, the motion fails as to this patent. The other patents are not seriously assailed, and it is not denied that the defendants have appropriated the improvements covered by them, and are now employing them in their glucose factories.

An attempt has been made to present the defence of abandonment. It is not claimed that there had been any abandonment before the letters patent were obtained, and the facts disclosed signally fail to show any intention on the part of the owners of the patents to abandon or dedicate their rights to the public subsequently. It is not shown that the owners of the patents prior to the Jebbs, who acquired title in the spring of 1881, had any knowledge that the defendants or others were using the patented improvements. It would seem to be fairly inferable, although not distinctly shown, that the Gilberts, who owned all the patents prior to the purchase by the Jebbs, intended to preclude the public from participation in the use of the patents, and to use them exclusively in their own starch factories. The improvements were surreptitiously appropriated from the Gilberts by Fox & Co., from whom they were also surreptitiously acquired by the Buffalo Grape Sugar Company and these defendants. The history of the process patent throws no light upon that of the apparatus patents.

It is insisted that the complainant has not shown such an exclusive enjoyment by the owners of the patents, and recognition by the public of their rights, as to authorize a preliminary injunction, in the absence of any adjudication upon the patent. If, by the policy of the owners, information as to the practical working of the inventions was withheld from the public, of course there could not be such a recognition and acquiescence as in many of the cases has been held to be necessary. Formerly the rule undoubtedly was that a preliminary injunction would not be granted unless the right secured by the patent was fortified by evidence of an exclusive or recognized enjoyment of the right, or by former adjudications sustaining it. In more recent practice this rule has been relaxed when the validity of the pat-

ent is not assailed, and the proof of infringement is clear. *North v. Kershaw*, 4 Blatchf. 70; *The Burleigh Rock Drill Co. v. Loddell*, 1 Ban. & A. 625; *Steam Gauge & Lantern Co. v. Miller*, 8 FED. REP. 314. It would seem that the presumption arising from the grant, especially when not of recent date, ought to suffice as against a defendant who has appropriated an invention secured to another by letters patent which are not attacked. It is not necessary, however, to pass definitely upon the point in the present case, because the injunction must be denied upon another ground.

The complainant has recently purchased the patents and proposes to use them, not by manufacturing under them, but by selling licenses to others. It is expressly alleged in the moving affidavits that the complainant does not desire to enjoin the defendants, provided they will accept a license and pay damages at the same rate as other licensees. It does not appear that complainant has as yet established any license fee for the use of the apparatus patents independently of the process patent. The sum which defendants should pay cannot, therefore, well be determined except by an accounting for profits; and, as they are entirely responsible, when this is had the complainant can be adequately compensated. Irreparable damage is an indispensable element upon an application for a provisional injunction. *Sanders v. Logan*, 2 Fish. 167; *Morris Manuf'g Co. v. Lowell*, 3 Fish. 67; *Pullman v. B. & O. R. Co.* 5 FED. REP. 72.

On the other hand, the defendants have gradually created and developed an extensive market for glucose and grape sugar; so large that if their works were stopped the demand could not be well supplied, and serious inconvenience would result. They have not only invested a large capital in their manufacturing business, but they employ a great number of workmen, many of whom would be temporarily cut adrift if an injunction were granted. It is difficult to see how the defendants could remove the patented apparatus without substantially dismantling and reorganizing their works. Under such circumstances the equitable considerations which appeal to the discretion of the court, and within well-recognized rules should lead to the refusal of a preliminary injunction, cannot be ignored.

If the complainant has any reason to doubt the pecuniary ability of the defendants now, or at any future time, to pay any decree that may be obtained in suit, it may apply for a further order requiring the defendants to enter into a bond with sureties.

HOSTETTER and another v. ADAMS and another.*

(Circuit Court, S. D. New York. February 18, 1882.)

1. LABELS—"HOSTETTER'S STOMACH BITTERS"—INFRINGEMENT.

The label and method of preparation for market of "Hostetter's Celebrated Stomach Bitters" is infringed by that adopted for "Clayton & Russell's Celebrated Stomach Bitters," inasmuch as the latter is plainly copied from the former by design, and its general effect is such as to deceive an ordinary observer having no cause to use more than ordinary caution.

A. H. Clarke, W. W. Goodrich, and J. Watson, for plaintiffs.

W. H. Arnoux and A. Dutcher, for defendants.

BLATCHFORD, C. J. The bill alleges that the plaintiffs are, and for 27 years or more have been, partners doing business as Hostetter & Smith, and during that time engaged in making and selling a medicine known as "Hostetter's Celebrated Stomach Bitters;" that they have the sole ownership of the good-will, labels, or trade-marks of said bitters; that said bitters have acquired a reputation as a safe and valuable medicine; that, in order to designate said bitters as of their own compounding and as genuine, and to prevent fraud by having spurious bitters sold as and for the genuine, they from the beginning devised certain labels, tokens, or trade-marks, and a certain manner of putting up said bitters, placing them upon the market in a style different from that in use by manufacturers or dealers in like articles, and that they have adhered to said style up to the present time; that said bitters are placed by them in square bottles, of uniform size, known as No. 6, containing about one and a half pints, and having blown therein the name "Dr. J. Hostetter's Stomach Bitters," and upon these bottles they cause to be pasted labels or trade-marks, and the bottles then have revenue stamps put on them, and are packed in square boxes, each box containing a dozen bottles, and, so boxed, are sold to dealers; that the defendants are making and selling a spurious and inferior article of bitters, prepared in imitation of, and intended to be sold as and for, the genuine Hostetter's Celebrated Stomach Bitters of the plaintiffs' own manufacture, and calculated to deceive the public and consumers, and to enable the defendant to reap the profits of the reputation and sale of them; that, with like intent, the defendants have printed a false label or trade-mark in imitation of, and closely resembling, one of the plaintiffs' labels, said false label being well calculated to mislead and deceive

*Reported by S. Nelson White, Esq., of the New York bar.

customers and consumers of the genuine bitters; and that the defendants use the bottles of the plaintiffs, from which the genuine bitters have been used, and pack them in the same manner, in cases of the same shape, one dozen bottles in each case, in which manner they are sold. The bill prays for an injunction restraining the defendants from using said spurious label, and for other proper relief. The case has been heard on pleadings and proofs.

The plaintiff's bottle is of dark glass and has a four-sided body, the sides being of equal size and the faces rectangular. On one side is an engraved label with a white body. This label is substantially as long and as wide as the face of the bottle. Near the top, in four lines, in black, are the words "Hostetter's Celebrated Stomach Bitters," one word in each line. The third and fourth lines have letters of the same size and character, larger than the letters in the first and second lines. The letters in the first line are larger than those in the second line, and of a different character from them, and from those in the third and fourth lines. The letters in the first line and those in the fourth line each of them form a curve, the convexity of which is upward. The second and third lines are horizontal. The letters in the first, third, and fourth lines are shaded. Underneath the fourth line is a horse without harness vaulting in the air towards the left, with his hind feet on the ground and his fore feet in the air, mounted on his bare back by a naked man, with a helmet on, and a flying robe over his right arm, and in his two hands a spear, with which he is striking at a dragon below him on his left. The open mouth of the dragon is near the left knee of the rider, and the point of the spear is just above that knee. The body of the dragon passes under the horse, and his tail comes around the right hind leg of the horse and nearly reaches the body again. In a fore paw of the dragon, near the end of his tail, appears to be a piece broken off from the head of the spear. The horse has a flying mane and a sweeping tail. The horse, man, and dragon are dark on a white ground. Below them is a shield, commencing at a little below the middle of the length of the label. The shield has a dark ground. On it are letters printed in white. There are 16 lines of letters. Lines 1, 2, 4, 7, 8, 9, 10, 12, 13, 14, and 15 are the same size of type. The reading of the 16 lines, divided into lines, is this:

(1) "The best evidence of the merit of an article is" (2) "the disposition to produce counterfeits;" (3) "and we regard it as" (4) "the strongest testimony to the value of" (5) "Hostetter's" (6) "Celebrated Stomach Bitters" (7) "that attempts of that description have" (8) "been frequent. A due consid-

eration of" (9) "the public welfare has induced us to" (10) "obtain a fine engraving, of which" (11) "this is a fac-simile," (12) "and to append our note of" (13) "hand, which cannot be" (14) "counterfeited without" (15) "the perpetration" (16) "of a felony."

The word "and" and the word "as," in line 3, are smaller than the other letters. The words "we regard it," in line 3, and also lines 5, 6, 11, and 16, are on a black ground darker than the rest of the ground, and the letters are somewhat larger than the rest. All the letters in the shield are capitals. The line of the top of the shield consists of two curves of equal length, starting from an apex in the middle of the width and concave upwards, and having a uniform sweep, and alike, and rising each to a point as high as the starting point, and then each falling off, by a short concave upward curve, to a point. Then the two sides of the shield sweep around downward, by equal curves, to the center of the width of the label and the lower point of the shield, completing the outline of the shield. The space on each side, between the outer edge of the shield and a border around the label and a horizontal line running across at the lower point of the shield, is filled in with engraved work of waving, irregular figures. Underneath the shield, in a parallelogram, is a promissory note for one cent, payable to the bearer on demand, signed "Hostetter & Smith." In the middle of the width of the upper part of the note is a small circle, having in it the head and bust of an aged man with a long white beard. There is a border around the whole label.

The defendants' bottle is of the same size, color, shape, and material as the plaintiffs', and many of the defendants' bottles are old bottles of the plaintiffs with the name "Hostetter" blown in the glass. The side which has that name on it is covered by the defendants' label. The defendants buy such old bottles when empty which the plaintiffs have sold in the market with bitters in. On one side is an engraved label with a white body. This label is substantially as long and as wide as the face of the bottle, and is of the same size as the plaintiffs' label. Near the top, in four lines in black, are the words "Clayton & Russell's Celebrated Stomach Bitters," one word in each line. The third and fourth lines have letters of the same size and character, larger than the letters in the first and second lines. The letters in the first line are larger than those in the second line, and of a different character from them, and from those in the third and fourth lines. The letters in the first line and those in the fourth line each of them form a curve, the convexity of which is

upward. The second and third lines are horizontal. The letters in the first, third, and fourth lines are shaded. The appearance presented by those four lines, as to the size and character and shading of the letters in the corresponding lines, and as to ornamentation in flourishes and dashes, is identical with the appearance presented by the corresponding four lines in the plaintiffs' label, as to the same particulars, except the difference resulting from substituting the words "Clayton & Russel's" for the word "Hostetter's." Underneath the fourth line is a horse, with harness and caparison and saddle upon him, vaulting in the air towards the right, with his hind feet on the ground and his fore feet in the air, mounted by a man with clothing on his trunk and feet, and a helmet, with wings on his head, and in his right hand a spear, with which he is striking at a scorpion on the ground in front of him. The horse has a sweeping tail. The horse, man, and scorpion are dark on a white ground. They and the four lines above them occupy respectively the same space up and down as the corresponding parts in the plaintiffs' label. Below them, commencing at the same point as in the plaintiffs', is a shield, which has a dark ground, with letters printed on it in white. There are 15 lines. The lines are all the same size of type, and the size of the type in line 1 in the plaintiffs'. The reading of the 15 lines, divided into lines, is this:

(1) "The bitters of Clayton & Russell will be" (2) "found a highly aromatic liquid and en-" (3) "tirely free from injurious substances." (4) "One wine-glassful taken three times" (5) "a day before meals will be a swift" (6) "and certain cure for dyspepsia a" (7) "mild and safe invigorant for delica-" (8) "te females a good tonic preparation" (9) "for ordinary family purposes a" (10) "powerful recuperant after the" (11) "frame has been reduced by" (12) "sickness an excellent app-" (13) "etizer and an agreeable" (14) "and wholesome" (15) "stimulant."

All the letters in the shield are capitals. The line of the top of the shield is made up of four curves, and corresponds in all respects with the line of the top of the shield in the plaintiffs'. The shield is the same size and shape as the plaintiffs', and has a corresponding space on each side, filled in with engraved work, waving in character, though larger in detail than in the plaintiffs'. The lower point of the shield comes down to the same point as in the plaintiffs'. Underneath the shield, in a parallelogram, are the words: "Venders do not require a liquor-dealer's license, being a medicinal compound." There is a border around the whole label of about the same width as

in the plaintiffs', though of a different character. There is a narrow space of white in the defendants' all around the lower parallelogram, and the side lines of white are carried up on each side of the top of the shield, and then continue down around the outer edges of the shield, differing in these respects from the plaintiffs'. The words beginning with "one wineglassful," to the end, at "stimulant," are formed in a label of gold letters, printed on a bronze ground, which is on another face of the plaintiffs' bottle.

It is shown that there are no such persons as Clayton & Russell, and that the defendants' label was prepared from the plaintiffs' by intentionally making the parts in it which are like corresponding parts in the plaintiffs', to be so like. It is plain that it is a copy from the plaintiffs' by design. Variations are made of such a character as to be capable of discernment and description. But the general effect to the eye of an ordinary person, acquainted with the plaintiffs' bottle and label, and never having seen the defendants' label, and not expecting to see it, must be, on seeing the defendants', to be misled into thinking it is what he has known as the plaintiffs'. The size, color, and shape of the bottle,—the four lines of letters at the top of the label being, as to the three lower ones, identical, and, as to the upper one, differing only in the name,—the general effect of the horse and his rider, the size and shape and color of the shield, the white letters in it, and their size and arrangement in lines contracting in length towards the lower point of the shield, the whole in black on a white ground, and the border, give an affirmative resemblance calculated to deceive an ordinary observer and purchaser, having no cause to use more than ordinary caution, and make him believe he has before him the same thing which he has before seen on the plaintiffs' bottle and expects to find on the bottle he is looking at. The differences which he would see on having his attention called to them are not of such a character as to overcome the resemblances to the eye of a person expecting to see only the plaintiffs' bottle and label, and having no knowledge of another. The testimony to the above effect is of great strength.

The plaintiffs have no exclusive right to make the bitters. Their trade-mark is not in the words "Celebrated Stomach Bitters," nor have they any exclusive right to a bottle of the size, shape, and color of the one which they use. But the entire style of their bottle and label, of which those words form a part, is, in connection with the other particulars above mentioned, in which the defendants' bottle and label are like theirs, the mark of their trade. *Williams v. Johnson*, 2

Bos. 1; *McClellan v. Fleming*, 96 U. S. 245; *Frese v. Buchof*, 14 Blatchf. 432; *Coleman v. Crump*, 70 N. Y. 573; *Morgan's Sons Co. v. Troxell*, 23 Hun. 632, and *Cox's Manual*, Case, 674; *Sawyer v. Horn*, *Cox's Manual*, Case, 667; *Mitchell v. Henry*, 43 Law Times Rep. (N. S.) 186.

The evidence as to transactions after the filing of the bill is admissible. It comes in not to show infringement, but to characterize the practical use of the subject-matter of the suit. The objection as to the recalling of witnesses is overruled. The plaintiffs are entitled to an injunction, and to a reference to a master to take an account of profits, and to the costs of the suit.

THE CITY OF SALEM.

(District Court, D. Oregon. March 4, 1882.)

1. PLEADING—SUFFICIENCY OF AN ANSWER.

Semble that an allegation in an answer that the respondent is "ignorant" of a matter alleged in the libel is sufficient.

2. VESSELS—LIEN FOR LABOR—HOME PORT—STATE LAW.

The libel alleged that S. contracted with R., the owner of a steam-boat, to repair her in her home port, and employed the libellants to work at said repairs as ship carpenters. *Held*, that upon the facts stated, and under the lien law of Oregon, (Sess. Laws 1876, p. 9,) which gives a lien upon a boat for the value of labor done thereon at the request of a contractor with the owner, the libellants had a lien for their wages which might be enforced in the admiralty in a suit *in rem*, irrespective of the state of the accounts between S. and R., or the failure of S. to fully perform his contract.

3. LIEN OF MATERIAL-MAN—NATURE AND WAIVER OF.

The lien of the material-man, under the Oregon act, does not depend upon any expressed intention or conscious purpose on his part to claim it, but it is an incident which the law attaches to the performance of the labor or the delivery of the materials under the circumstances stated, and can only be waived or discharged by an agreement or understanding with him to that effect.

David Goodsell, for libellants.

William H. Effinger, for respondent.

DEADY, D. J. This suit is brought to enforce a lien in favor of the libellants against the steam-boat City of Salem, a vessel engaged in the navigation of the waters of this state, and owned, enrolled, and licensed at this port.

The libel alleges that during the months of November and December, 1881, and January, 1882, said vessel was in the lawful posses-

sion of J. F. Steffen, for the purpose of being repaired; that during those months the libellants, Charles Nelson, Peter Johnson, and Jonas Carlson, at the request of said Steffen, worked upon said boat as ship carpenters "at the agreed rate of wages" of four dollars per day,—Nelson for 48 days, Johnson 22 days, and Carlson 29 days; that there is due said libellants on account of said labor as follows: To Nelson \$192, to Johnson \$88, and to Carlson \$116, no part of which has been paid, and for which they each claim a lien upon said boat under the laws of Oregon and under the general admiralty law.

The respondent, William Reid, answering the libel, says in article 1 that the boat belongs to respondent, and was only in possession of Steffen to be repaired upon a contract between them, but that said Steffen was not the agent of said owner "for the purpose of procuring any work or labor" on said boat, nor for any "purpose save that of executing the work he had contracted to do." In article 2 the respondent says that he is "ignorant" of the employment of the libellants upon the boat, and their claim to a lien thereon for their labor. The third article states, in effect, that Steffen abandoned his contract and the respondent was compelled to finish said repairs, and that there is now due said Steffen thereon the sum of \$927.50, which sum the respondent is willing to pay to the creditors of the latter entitled thereto, but is prevented from so doing by the process of the state circuit court issued at the suit of Steffen's creditors, and asks that the respondent be discharged without costs. The libellants except to the second article of the answer as insufficient, and to the third article, and so much of the first as states that Steffen was not the agent of the respondent to employ the libellants, for impertinence.

The exception for insufficiency is disallowed. When a respondent has no knowledge concerning the matter contained in any article of a libel, according to the precedents, it seems that it is sufficient to say that he is ignorant thereof; though I think it would be well to require him also to state what his belief about the matter is, as in answer in chancery. Ben. Adm. § 473.

The contract of a material-man is a maritime one, and may be enforced in admiralty. Ben. Adm. §§ 267, 268; *The St. Lawrence*, 1 Black, 522; *The Eliza Ladd*, 3 Sawy. 519. All persons who are employed to repair a vessel or do work upon her are material-men within this rule. 1 Pars. Ship. & Adm. 141; Ben. Adm. §§ 267, 268. By the general maritime law material-men have a lien upon the vessel for the services or supplies furnished by them; but by the admiralty law of the United States, as expounded by its courts, ma-

terial-men have no lien for services or supplies furnished a vessel in her home port unless given by the local law; but when so given such lien may be enforced in the admiralty. *De Lovio v. Boit*, 2 Mas. 414; *The Planter*, 7 Pet. 324; *The Harrison*, 1 Sawy. 353; *The Gen. Smith*, 4 Wheat. 438; *The Lottawanna*, 21 Wall. 579; *The Canada*, 7 FED. REP. 732. The only other question arising upon these exceptions is, have the libellants a lien upon the vessel for their services by the local law,—the law of Oregon?

By the act of October 19, 1876, (Sess. Laws, 8,) section 17 of the act of December 22, 1853, (Or. Laws, 656,) "concerning the liens of mechanics, laborers, and other persons," was amended so as to provide, among other things, that "every boat or vessel used in navigating the waters of this state * * * shall be liable and subjected to a lien * * * for all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, *contractors*, or subcontractors of such owner, or any of them, or *with any person having them employed* to construct, repair, or launch such boat or vessel, on account of labor done, or materials furnished, by mechanics, tradesmen, or others, in the building, repairing, fitting and furnishing, or equipping such boat or vessel. * * *" Prior to this amendment the act only gave a lien for the value of labor or materials done or furnished in pursuance of a contract with "the master, owner, agent, or consignee" of the boat. But, when done or furnished for a *contractor*, not such "master, owner, agent, or consignee," the parties had no lien, and often lost the value of their labor or materials by the failure or dishonesty of the contractor. To remedy this evil the act was amended so as to give all persons a lien for labor or materials furnished in pursuance of a contract with any person authorized to employ labor or purchase materials to repair, fit, furnish, or equip a boat engaged in the navigation of the waters of this state.

The agent, contractor, or subcontractor, or the owner of a boat, is necessarily authorized, by the nature and terms of his agreement of employment, to procure the labor and materials necessary to accomplish what he is authorized by or contracted with the owner to do thereon or thereabout. The very general phrase in the amendment—"any person *having them* [material-men] employed to construct, repair," etc.—must be construed to mean any person having them so employed by the authority of the owner. For it cannot be supposed that the legislature intended that the "any person" mentioned in the

section applies to any one other than a person within the category of persons just before enumerated; that is, a person sustaining some relation to the owner that authorizes him to employ the labor or purchase the material in question.

A mere trespasser or intruder upon the boat of another surely cannot fasten a lien upon it for the value of labor and materials used in unauthorized repairs thereon.

As was said by this court in *The Augusta*, 5 Am. L. T. Rep. 495: "A person who puts work or materials into the ship of another as a mere trespasser or intruder, does not thereby become a material-man, entitled to a lien thereon for the value of such work or materials. But the consent of the owner may be implied from the circumstances of the case. For instance, when the respondent [the owner] contracted with Rutter to repair the vessel, it was necessarily implied that he might employ the libellants, and they might be so employed to work thereon. They are, therefore, not intruders or strangers to this vessel, but persons employed to work thereon with the implied consent of the owner."

It is admitted by the answer that at the time alleged by the libellants that they labored on the City of Salem she was in the possession of Steffen under a contract with the respondent to repair her. This being so, he was authorized to employ the libellants to do any work upon her within the scope of his contract. Assuming that the libellants were employed by Steffen, and did the work on the boat, as they allege, they thereby acquired a lien thereon for the value of their labor. Neither is it necessary that they should, at the time of performing the labor, have expressed a purpose or consciously intended to claim a lien therefor upon the vessel. The law gives the lien upon the performance of the labor as a means of securing the payment for it. It is an incident which the law attaches to the transaction, and can only be waived or discharged by an agreement or understanding to that effect on the part of the person entitled to it.

These exceptions for impertinence are well taken. It matters not, so far as the claims of the libellants are concerned, what controversy exists between Steffen and his creditors, or how the respondent is involved in it—whether as garnishee or otherwise. If they performed the work on the respondent's boat, as they allege they did, they have a lien thereon for its value, irrespective of the state of the accounts between him and Steffen, and are entitled to maintain this suit to establish their claim, and enforce such lien by the sale of the boat. They are not creditors of the respondent, and the only relation

between him and them arises out of the fact that he is the owner of a boat upon which they claim a lien for labor. On that account he is entitled to contest the fact of the indebtedness, or to show that the lien given by the law therefor has been waived or discharged, or failing in these to discharge the lien by the payment of whatever sum is found due the libellants, and thereby prevent the sale of the boat.

The exception for insufficiency is disallowed, and the exceptions for impertinence are allowed.

See *The De Smet*, ante, 483, and note.

THE CITY OF SALEM.

(District Court, D. Oregon. March 4, 1882.)

DEADY, D. J. This suit is brought by Charles Brown against the city of Salem to enforce a lien thereon for the sum of \$60 for labor done in repairing her at the request of Steffen, the contractor.

The pleadings and circumstances are the same as the foregoing, and the same order will be made therein.

THE THAMES.

(District Court, S. D. New York. December 23, 1881.)

1. MARITIME LIEN—SERVICES IN PROCURING CHARTER.

A shipping broker has no lien on a vessel, in admiralty, for services in procuring a charter-party.

In Admiralty.

F. A. Wilcox, for libellants, cited 5 Ben. 63, 70, 71; 2 FED. REP. 722; 4 Ben. 864; 8 Chi. Leg. News, 401; 3 N. Y. Wkly. Dig. 425; 2 Low. 482; 17 Wall. 666; 1 Dill. 460; 2 Low. 173; 5 Ben. 74, 78.

Michael H. Cardozo, for claimant, cited 1 Abb. Adm. 340, 490; Etting, Adm. 69, 74; 2 Olcott, 120; 3 Mason, 6; 3 Sumn. 144.

(On general subject of maritime liens, see 21 Am. Law Reg. 1, 82; 16 Am. Law Rev. 193.—[REP.]

BROWN, D. J. I am not prepared to assert jurisdiction in admiralty in this case. In the case of *The Riga*, L. R. 3 Ad. & Eccl. 516, the ultimate determination is not reported, and the question depended wholly upon the statute, (3 & 4 Vict.) In this country such jurisdiction has never been asserted. In *The Gustavia*, Bl. & H. 189, shipping a crew was held like furnishing necessary supplies for a voyage. The distinction between preliminary services leading to a maritime contract and such contracts themselves have been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow,—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.

In *Merchant v. Lulan*, upon a similar case, the libel was dismissed on execution (as I find on examination) on February 22, 1879, by *Benedict, J.*, in the eastern district, and the same decision must be made here.

Libel dismissed, with costs.

See *Ferris v. The Bark E. D. Jewett*, 2 FED. REP. 111.

HUBBARD v. BELLEW and others.

(Circuit Court, W. D. Wisconsin. February 4, 1882.)

1. CONTRACT—CONSTRUCTION.

A written contract was entered into in August, 1875, between B. on one side and certain parties residents of another state, by their attorney, S., on the other side. By the contract, the parties, through their attorney, agree to sell to B. a quantity of timber lands, the price to be determined by an estimate to be afterwards made of the amount of pine timber upon each description of land at \$2.50 per acre for the stumpage. They also agree to sell to B. the pine timber upon certain other lands described, at the rate of \$2.50 per thousand feet for stumpage. B., on his part, agreed to build a saw-mill worth \$9,000 upon one of the 40-acre tracts, to be selected by him; and the other parties agree to give him title to the 40-acre tract so selected for the mill site, which B. is to have the privilege of mortgaging to an outside party in the sum of \$6,500, and then he is to give a second mortgage back to the vendors to secure the faithful performance of the contract. After the execution and delivery of the contract, B. borrowed from H., the plaintiff in this suit, upon the strength of the contract, about \$10,000, to build and complete the contemplated mill. After the mill was built, B. gave to H., the plaintiff herein, a deed intended as a mortgage of the mill and mill site, to secure him for his advances, without the knowledge of S., the agent of the vendors, and before they had made any conveyance of the land to B. Afterwards the vendors brought suit in the state court to enforce a specific performance of the contract, and obtained a decree for that purpose against B., from which an appeal was taken to the supreme court, and the decree affirmed, H. not having been a party to the suit. *Held*, that B., under the contract, was at liberty to select any 40-acre tract for the mill site, whether one of the forties he was to purchase or one of those from which he was to buy the timber.

2. SAME—LIEN FOR MONEYS ADVANCED.

Where moneys were advanced upon the strength of a contract, and a subsequent conveyance was received to secure such advances, the party so making the advances is, under the circumstances of the case, justly and equitably entitled to a lien upon the mill forty as against the owners of the land, but not exceeding the sum mentioned in the contract.

3. SAME—PAROL MODIFICATIONS—NOT TO AFFECT EQUITIES.

Where a party had agreed to advance money upon the strength of a written contract, he becoming the third or outside party named in the contract, any parol or other modification of the written contract unknown to him cannot affect his equities, whether made before or after the time he made the advances.

In Equity.

J. S. Anderson and Vilas & Bryant, for complainant.

Sloan, Stevens & Morris, for defendants.

BUNN, D. J. This is a suit in equity brought to have a lien declared and enforced against a certain 40 acres of land, and saw-mill situate thereon, lying in the county of St. Croix, in this state, described

as follows: The N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 34, in township No. 30 north, of range No. 15 west.

The suit is founded in part upon a written contract entered into between the defendant Patrick Bellew on the one side, and Erastus Corning, Horatio Seymour, William Allen Butler, William B. Ogden, and other persons residing in the state of New York, and B. J. Stevens, residing in the state of Wisconsin, land-owners, by Augustus Ledyard Smith, their attorney, on the other. This contract was made in August, 1875. The defendant Patrick Bellew was a lumberman residing in Wisconsin. The other parties to the contract were the owners in severalty of large quantities of pine lands lying in northern Wisconsin. By the contract they, through their agent, Augustus Ledyard Smith, residing at Appleton, Wisconsin, agree to sell to Bellew a quantity of pine lands lying in the county of St. Croix, the price to be determined by an estimate to be afterwards made of the amount of pine timber upon each description of land at \$2.50 an acre for the stumpage. They also agree to sell to Bellew the pine timber upon certain other lands described in the contract at the rate of \$2.50 per thousand feet for stumpage.

Bellew is to build a saw-mill worth \$9,000 upon one of the 40-acre tracts of land included in the contract, to be selected by him, and the other parties to the contract agree to give him title to the 40 acres so selected for the mill site, after which Bellew is to have the privilege of mortgaging the land selected for the mill site to an outside party in the sum of \$6,500, and then is to give a second mortgage back to the other parties to the contract to secure the faithful performance of the contract. The material provision in the contract, on which the suit is in part founded, is as follows:

"And the said party of the second part does hereby covenant and agree with the said parties of the first part, for and in consideration of one dollar, to him in hand paid, the receipt whereof is hereby acknowledged, to build, maintain, and erect a good, substantial saw-mill upon certain lands, to be hereinafter described; the mill to be of the value of at least \$9,000. The land upon which said mill is to be built is to be hereafter selected by the party of the second part, and the forty upon which it is built and erected is to be conveyed by the parties of the first part, by good and sufficient deed, conveying to the party of the second part the title thereof in fee-simple. And the said party of the second part is to have the right to mortgage the forty upon which the said mill is built, after the same shall have been conveyed to him as aforesaid, to an outside or third party, in a sum not exceeding \$6,500, and after the same is so mortgaged he covenants and agrees to give to the party of the first part a second mortgage on the said land upon which the mill is built, as aforesaid, and which is conveyed to him, as aforesaid, and which said

second mortgage is to be as security, and to be conditioned for the faithful performance of this contract on the part of the said party of the second part. And the said parties of the first part, in consideration of the building, maintaining, and erection of the said mill, as aforesaid, covenants and agrees with the said party of the second part to sell and convey to him the following described real estate, to-wit," etc.

After the execution and delivery of the contract, in November, 1875, Bellew takes it to Stephen Hubbard, shows him the contract, and requests Hubbard to advance him money to build the mill. Hubbard examines the contract; reads it through, and on the strength of the above provision he agrees to advance money, and does in fact, during that same fall and winter, to-wit, in November and December, 1875, and January and February, 1876, advance money and means to Bellew, to the aggregate in the amount of about \$10,000, to build and complete the mill upon a 40 acres selected by Bellew.

It is claimed by the complainant that there was an agreement between Bellew and Smith, the agent, after Hubbard had begun to advance means to build the mill, that Bellew might mortgage for a larger sum than \$6,500, and there was proof taken to this effect. But the plaintiff, on the hearing, waives all claim to any lien for more than the \$6,500 and interest.

The question is whether he is entitled to any lien on the mill and mill site for this amount. The mill was built during the fall of 1875 and winter of 1875-6, and the evidence shows it to have been worth \$12,000. On February 6, 1876, after Hubbard had made the advances to build the mill, and after the mill was completed, he went to Bellew and asked him to give him security on the mill forty for the advances. Bellew said he would, and they had a deed made by Bellew and his wife to Hubbard of the mill forty which was, between the parties, intended as a mortgage to secure Hubbard for the advances so made to build the mill. This was done without the knowledge of Smith, or of the land-owners whom he represented, and before they had made any conveyance of the land to Bellew, as provided in the contract. In fact, this conveyance has never been made. The deed to Hubbard by Bellew and wife is dated on February 6, 1876, expresses the consideration of \$10,000, which was the amount it was agreed Hubbard had advanced, and was duly recorded as a deed in the proper office. It is in evidence that the agent, Smith, knew from time to time that Hubbard was advancing money to Bellew to build the mill, and that after the deed by Bellew to Hubbard

was given it was spoken of and recognized by Smith as a mortgage to secure Hubbard's advances.

After the mill was built, Bellew went on and cut timber from the land and made it into lumber and shingles, but, failing to pay for the land and lumber as he had agreed, the other party to the contract, in 1878, brought suit in the circuit court of St. Croix county to enforce a specific performance of the contract, and obtained a decree for that purpose, from which an appeal was taken by the plaintiffs in that suit to the supreme court, where the judgment of the circuit court was affirmed. See *Marsh v. Bellew*, 45 Wis. 36. Hubbard was not made a party to that suit. The circuit court, on the trial in that case, found among other things that the written contract was by a subsequent verbal agreement, made in or about September, 1875, between the parties, modified by giving Bellew permission to erect the mill on either one of three pieces of land at the option of Bellew, to-wit, the N. E. N. W. 34, the N. W. N. W. 34, or the S. W. S. W. 27, instead of on the land named in the contract as that to be purchased by Bellew, and that it was agreed that for the 40-acre tract upon which the mill should be situated, Bellew should pay as purchase price thereof the value of the stumpage thereon, at the rates provided for in the written contract, as modified by such verbal agreement, and that for the other two 40-acre tracts he should pay, in addition to the value of the timber thereon, at said rate, the sum of five dollars per acre, amounting to \$400, for both of said last-named 40-acre tracts; and that such modification was without any new consultation except the agreement on the part of Bellew to purchase two additional 40-acre tracts at the rate of five dollars per acre. There is evidence to show that it was agreed between Bellew and Smith that Bellew might select either one of the above three forties for the mill site, and that he should buy the other two forties and pay five dollars per acre therefor in addition to the pine stumpage. But I am not prepared to say that there was any modification of the written contract so far as the location of the mill was concerned. On the contrary, I see nothing in the contract to prevent Bellew from selecting any forty named in the contract for the mill site, whether it was one of the forties he was to purchase and take title to, or one of those from which he was to buy the timber.

It seems to me that Bellew was at liberty, under the written contract, to select any forty named in the contract that should suit his purpose of location of the mill best. The language is general; and I

see nothing in the contract to restrict him in his selection to one, any more than to the other, class of lands. The mill was to be built to accommodate the business of sawing the timber for all the lands; and it was to be built for the benefit of both parties to the contract. Bellew was, it is true, to have a deed in fee of the 40-acre tract selected; but, after mortgaging it to a third party to secure the sum of \$6,500, he was to give a second mortgage to the parties to the contract, to secure the faithful performance of the contract. It was as much for the interest of one party as the other, that it should be in the best location possible, for the purpose of its construction and use. The question presented by the case is whether or not Hubbard, by virtue of his having advanced the money on the strength of the contract to build the mill, and the subsequent conveyance to him by Bellew to secure such advances, is justly and equitably entitled to a lien upon the mill forty, as against the owners of the land, for the amount of the advances made, not exceeding the sum of \$6,500, mentioned in the contract; and I think he is so entitled.

It is claimed by the defendant land-owners that the contract with Bellew was an entirety, and that Bellew having failed to perform it, and a judgment of a state court having gone against him, foreclosing and cutting off his rights under the contract, and Hubbard's interests being subject and subsequent to those of Bellew, he was also substantially barred by the judgment against Bellew. But it is quite clear that this view cannot be maintained. Bellew had six years in which to cut the timber from the land and pay for it. At first he was to pay for the timber in advance of cutting from time to time, but afterwards this condition was waived, and the contract modified so as to allow him to cut the timber and pay for it and the land afterwards. But it is evident from the contract that as soon as Bellew had selected a forty for his mill site and built a good substantial mill upon it, worth \$9,000, he was entitled to a deed conveying the title to that forty. All this he did in the fall of 1875 and winter of 1875-6, soon after the contract was made. There is no evidence that up to that time he had broken his contract, and it seems quite clear that under the contract, when he had built the mill, he had earned the right to a deed of the mill site, and after a deed should be given he had the right to give a first mortgage to Hubbard, to secure the \$6,500 of advances. If at that time Bellew had asked for a conveyance of the mill forty he would have been entitled to receive it. It would have been the duty of the land-owners, under the

contract, to give him a deed, and I think, so far as Hubbard's rights are concerned, what ought then to have been done the court will consider as having been done. It is clear that if they had given Bellew a deed, and then he had given a deed, as he did do, to Hubbard, to secure his advances, it would have been a first lien on the premises, the same as though Bellew had given a mortgage in form. But Bellew having earned the right to a conveyance, and being entitled to one because of having built the mill, he had an equitable interest in the premises, and was in equity the substantial owner, subject of course to his obligation to give to the legal owners a second mortgage to secure the due performance of the entire contract on his part.

Hubbard's rights in the premises are not subject to those of Bellew, nor was he in any way concluded by the judgment against Bellew. On the contrary, whatever right he has is not only superior to those of Bellew, but to those of the defendant land-owners as well. This is the natural and inevitable meaning of the contract. It was clearly contemplated by the parties, and all their acts show it, that it was expected that Bellew would have to borrow money to enable him to build the mill. It was for the mutual benefit of both parties to the written contract that a mill should be built. This was no doubt the primary means relied upon by both to enable Bellew to pay for the lands and the timber, and both parties were mutually interested, not only in the building of the mill but in the selection of the best location. It is the first and one of the primary stipulations in the contract, on the part of Bellew, that he will build a mill worth at least \$9,000, and it is in consideration of this that the other parties agree to sell him the land and timber; and, evidently, to enable him to build the mill, this provision is found in the contract that he shall be entitled to a deed and clear title to that forty, to enable him to mortgage it to secure an outside or third party, to secure advances; and the stipulation that, after so mortgaging it to such outside party for \$6,500, Bellew should give back a second mortgage to the original owners of the land, shows that their interests in the mill and mill site were to be subject and secondary to those of the outside party who might be induced to step in and furnish money to build the mill. And this is a sufficient answer to the position taken by defendants that by modification of the contract in regard to the location of the mill an obligation was imposed upon Bellew to pay for the stumpage with the mill forty, and, besides the stumpage, to pay five dollars per acre for the two forties connected with the one on which the mill was located.

It is evident that, whatever else this modification was, it was not contemplated that Bellew should pay for these forties or any of them as a condition precedent to his right to receive a deed of the mill forty. There is nothing in the evidence and nothing in the contract to show that such was the understanding of the parties. On the contrary, it is evident that the land-owners were content to take a second lien on the mill premises to secure their rights. Under any less liberal provision very likely no one could have been found to advance moneys to build the mill. And this, I have no doubt, was in the contemplation of the parties. But this modification seems to me no more than a partial designation or selection of the mill forty, confining the selection to one of the three named forties, and that, under the written contract, this same forty might have been properly selected by Bellew, and that the additional stipulation by parol that Bellew should pay five dollars per acre, and take a deed of the other two forties, in addition to paying for the pine timber, was entirely voluntary, and has nothing to do with the question of Hubbard's rights. This modification, whatever it was, was probably made before Hubbard had begun to make his advances, and before he had made the agreement with Bellew; but there is no evidence to show that he knew anything about it when made, or that the relation of the parties had been changed from what he found them under the written contract, when he engaged to advance the means to build the mill.

I am unable to see that Hubbard's rights are affected by the modification. This provision in the contract allowing Bellew to mortgage the mill site to some outside or third party seems to me in the nature of an open letter of credit to the person who should be induced to advance that sum of money to build the mill, and thus materially add to the value of the defendants' contract, and all of the lands included therein. And when it had been shown to Hubbard, and he had engaged to advance the money and become the third or outside party named in the contract, no parol or other modification of the written contract unknown to him could affect his equities, whether made before or after that time. There is evidence in the case to show that Smith, the agent of the land-owners, knew that Hubbard was the man who was furnishing the money to build the mill, and that after the deed was given by Bellew and wife, in February, 1876, to Hubbard to secure him for such advances, Smith recognized the validity of Hubbard's claim, and told him that he would see that his

(Hubbard's) mortgage was good, and that Hubbard should not lose anything on it. Smith was the agent who made the contract on the part of the land-owners in New York, and was their general agent and representative in this state, and while the plaintiff's case does not rest on this recognition of his rights by the defendants, such recognition confirms the construction put upon the contract-deed transaction by the court, and shows what the understanding of the parties was. That construction is also confirmed by the allegations of the defendant land-owners in their bill of complaint against Bellew in the state court, where they allege, and the court finds as one breach of the contract on the part of Bellew, that he had failed to give them a second mortgage on the mill forty to secure the contract with him. Of course, as they had never conveyed the mill forty to Bellew as they agreed in the contract, it was not essential to their security that Bellew should mortgage back to them; but the allegation serves to show the understanding of the contract, and that understanding comports with the letter and plain intent thereof, and the construction now put upon it by the court.

It is insisted, also, by the defendants, that the contract between Hubbard and Bellew is void, as being within the statute of frauds. But it is evident that the statute of frauds has no application to the case. So far as the creation of any interest in land is concerned, the evidence is in writing.

I think there should be a decree in favor of the plaintiff; that he should be adjudged to have a lien upon the mill 40 acres for the amount of \$6,500, with interest at 7 per cent. from the time of finishing, say February 6, 1876; and that the premises be sold as under a mortgage proper, to satisfy the amount of his said claim, with interest and costs of suit, giving the usual time of redemption.

APGAR v. CHRISTOPHERS.

(Circuit Court, D. New Jersey. March 13, 1882.)

1. EQUITY—ENJOINING PROCEEDINGS AT LAW.

Where there is an equitable title in a defendant to an action of ejectment, the court of equity, at his suit, will restrain the proceedings in such action, and direct the cause to proceed in the court of equity, where all defences can be considered, and where in a single proceeding the whole controversy, in all its aspects, may be settled.

2. SAME—INJUNCTION—RELIEF.

Where a person is in possession of land by a good, equitable right and title, and he is so circumstanced as that the legal estate is either in himself or in another as trustee for him, and an action of ejectment is brought against him by the one claiming as well the equitable as the legal right, and denying the legal as well as the equitable title of the person in possession, a court of equity will grant relief by way of injunction, inasmuch as the plaintiff in ejectment would, recovering in the action, hold merely as trustee for the defendant in such action.

On Bill, etc.

P. Bentley, for the motion.

S. B. Ransom, for defendant.

NIXON, D. J. The bill of complaint filed in the above case sets forth in substance that in the year 1824 one Mary Vermilya departed this life, seized in fee of certain real estate therein described, situated in the county of Hudson and state of New Jersey; that previous to her death, to-wit, on the second of September, 1824, she duly executed her last will and testament, in which, *inter alia*, she devised the said real estate to her mother, Sarah Vermilya, her brother, Thomas Vermilya, and her niece, Mary Ann Jarvis, in words following:

“And also I give and devise all my real estate, whatsoever and wheresoever, unto by niece, Mary Ann Jarvis, my mother, Sarah Vermilya, my brother, Thomas Vermilya, all of the said city of New York, to the survivor of them, and to the heirs and assigns of such survivor.”

It further alleges: That the devisee, Sarah Vermilya, died March 13, 1834, leaving the said Thomas and Mary Ann surviving her. That on the tenth of October following the said Thomas, for the consideration of \$100, made a deed of conveyance, without any covenants of warranty, to the said Mary Ann Jarvis, for “all of his estate, right, title, and interest whatsoever under the will of Mary Vermilya, or otherwise,” in and to the said real estate,—the said deed containing the following recitals:

"Whereas, Mary Vermilya, late of the city of New York, deceased, was, in her life-time, seized in fee-simple of and in certain lots, pieces, or parcels of ground, hereinafter more particularly described; and whereas, the said Mary Vermilya did, in and by her last will and testament, by her duly made and published to pass real estate, and bearing date the second day of September, A. D. 1824, give and devise all her real estate, whatsoever and wheresoever, unto her niece, Mary Ann Jarvis, her mother, Sarah Vermilya, and her brother, Thomas Vermilya, all of the city of New York, to the survivor of them, and to the heirs and assigns of such survivor; and whereas, Sarah Vermilya, my mother, is now dead, and the said property is now vested in me, the said Thomas Vermilya, and Mary Ann Jarvis, in fee-simple, and I, the said Thomas Vermilya, being desirous of vesting the whole in my niece, Mary Ann Jarvis, now, therefore, this indenture witnesseth," etc.

—That the said Mary Ann Jarvis, in the year 1840, intermarried with one Thomas S. Christophers. That on the sixth of September, 1844, she, together with her husband, being the owners in equity, and believing that she was at law the owner in fee-simple, of the said property, undertook, by their deed, to convey in fee-simple the same to one John Arbuckle, who entered into possession and spent large sums of money in erecting buildings thereon. That the said Mary Ann Christophers departed this life January 29, 1846, leaving the said Thomas Vermilya surviving her, and two children, Thomas V. J. Christophers and James J. V. Christophers. That the complainant now holds the said real estate, under the said John Arbuckle, by virtue of divers mesne conveyances. That the said Thomas Vermilya died in the month of September, 1853, after duly executing his last will and testament, which was admitted to probate before the surrogate of the city and county of New York, in which he devised the whole of his real estate to the two children of his niece, Mary Ann Jarvis, (Christophers,) and to Thomas S. Christophers, the husband of the said Mary Ann, to be held by them equally, in fee-simple. That the said James J. V. Christophers died October 3, 1865, intestate, and without issue, leaving his brother Thomas his only heir at law. That Thomas S. Christophers departed this life, intestate and unmarried, July 3, 1869, leaving his son Thomas his sole heir at law. That the only heirs at law of Mary Vermilya, at the time of her death, were Thomas Vermilya and Mary Ann Jarvis; and that the said Thomas V. J. Christophers has lately brought into this court an action of ejectment against James Brown, tenant of the complainant, in possession of a portion of the said premises, and the complainant has been admitted to defend the said suit as the landlord of James.

The prayer of the bill is that the defendant, Thomas V. J. Christophers, may be enjoined and restrained by decree (1) from prosecuting the said ejectment suit for the recovery of the complainant's said lands; (2) that the said deed, dated October 10, 1854, may be reformed to effectuate the intention of the parties thereto as therein expressed; (3) that the defendant be compelled to release to the complainant whatever apparent legal interest he may have in said lands, which he claims through either the said Thomas Vermilya or the said Mary Ann Jarvis; and (4) that he may have such other relief as the nature of the case may require.

The foregoing statement of the allegations and prayer of the bill reveals that the complainant has in view some relief in equity, which the court of law is not adequate to give. If it were simply a bill to restrain the suit at law, it would be necessary for the complainant not only to set out some ground of equitable relief, but to admit that he had no defence at law. No such admission is made in this case, because the bill contemplates something more than an injunction. It waives the question of estoppel, which is a legal as well as equitable defence, and asks the court of equity to look upon the deed of October 10, 1834, from Thomas Vermilya to Mary Ann Jarvis, as an executory agreement, which is a mere equitable defence, and to decree that the defendant, Thomas V. J. Christophers, shall carry out the manifest intention of the parties, as appears upon the face of the conveyance.

It is, therefore, a question of proceeding, and in all such questions it is the duty of the court to direct the course which will tend to diminish useless litigation. If the ejectment suit should go on and the plaintiff should succeed at law, the alleged equitable ground for relief would still remain, and must be met by the defendant. It seems better for all parties to meet it at once, in a suit where all defences can be considered, and where, in a single proceeding, the whole controversy, in all its aspects, may be settled.

This was the view taken by the learned chancellor of New Jersey, in the recent case of *Hannon v. Christophers*, after an able opinion of Vice-Chancellor Van Fleet, (see 7 Stew. 459,) and its propriety was clearly admitted in the opinion of the lord justices of the court of appeal in chancery, in the case of *Crofts v. Middleton*, 8 De G., M. & G. 192, in which it was held that where there was an equitable title in a defendant to an action of ejectment, the court of chancery, at his suit, would restrain the proceedings in the action, although there might be a question whether he would not be successful at law.

Discussing the question of the right of equity to interfere in a case where the suggestion was made that there was a defence at law, and speaking for the court, *Bruce*, L. J., says, (page 209 :)

"But the question is raised whether there is jurisdiction here against the Middletons. I assume that there is; for, before the suit, they brought the action of ejectment for the purpose and in the circumstances that I have stated, and I conceive that where a person is in possession of land by a good, equitable right, and the title is so circumstanced as that the legal estate is either in himself or in another, as trustee for the person in possession, and an action of ejectment is brought against the man in possession by the other, claiming as well the equitable as the legal right, and denying the legal as well as the equitable title of the person in possession, he is entitled, in a court of equity, to relief against the other by way of injunction, if not by way of conveyance and injunction,—in whichever of the two the legal estate may be vested,—inasmuch as the plaintiff in ejectment would, recovering in the action, hold merely as trustee for the defendant in it."

Let an injunction issue restraining the suit at law until further order. The defendant is allowed 30 days to answer the bill of complaint.

DICKINSON v. WORTHINGTON and others.

(Circuit Court, D. Maryland. January 21, 1880)

1. WILL—BEQUEST IN TRUST—CHARGE ON LAND—RELEASE.

Where a testator gave money in trust to a trustee, to be by him invested and held in trust for the use of the beneficiary for life, and after her death for others, the will declaring the money to be until paid a charge on the lands devised by him, and the will not expressly authorizing any one to give an acquittance for the money so charged on the lands devised, a paper, signed and acknowledged by the beneficiary of the trust and no one else, containing a mere statement made by her that the money had been invested to her satisfaction, and that she released the lands and the trustee from all liability therefor, is not a release, nor is it effectual for any purpose whatever.

2. RELEASE OF MORTGAGE—BENEFICIARY TO JOIN.

Where the trustee invested certain money in a mortgage on the land devised, he had no power under the limitations in the will to collect the amount due on the mortgage and release the same without the consent of the beneficiary, evidenced by her being a party to the deed of release, and signing, sealing, and acknowledging it. Such mortgage stands unaffected by the release.

3. SAME—WHEN EFFECTUAL.

Where the trustee had made a loan and taken a mortgage to secure it, and the loan being long overdue, he would, in the absence of some express restriction in the will, have the right to receive the money and the power to execute a release of the mortgage.

4. SAME—WHEN INEFFECTUAL.

A release of a mortgage without a surrender of the note is ineffectual. So, where the note secured by a mortgage is passed to a third party, a subsequent release of the mortgage by the mortgagee, without the surrender of the note, is void, as the assignment of the note operates as an assignment of the mortgage.

5. SALE OF LAND UNDER ORDER OF COURT—LIEN FOR PURCHASE MONEYS.

Where the trustee was authorized by the court to make a sale of certain land and simultaneously invest the purchase money in a mortgage on the same land, and he sold the land under the order of the court, but received no consideration, and no mortgage was ever given, the trustee had no authority, without a further order of the court, to afterwards receive the purchase money in cash, or make a deed for the land; and the proceedings in the court ordering the sale and the investment of the purchase money were sufficient to put any one dealing with the property upon inquiry as to why the mortgage had not been given. The lien for the purchase money was not lost by the execution of the deed by the trustee.

MORRIS, D. J. The principal questions in this case arise from a conflict between the claims of persons beneficially interested in certain trusts created by the will of Samuel Worthington, late of Baltimore county, deceased, and the alleged prior rights of a mortgagee to whom certain lands, devised by said testator, have since his death been conveyed.

The solution of these questions requires me to interpret the provisions of the will, and to pass upon the legal effect to be given to certain conveyances executed by parties interested thereunder; but as all these documents fully appear in the proceedings, I shall not attempt to make a statement of their contents or of the allegations of the bill, and will proceed to consider the issues which have been made and argued.

1. As to the paper dated the seventh of January, 1876, purporting to be a release from Mary E. L. Dickinson to Samuel W. Worthington, (Exhibit T.) The testator gave \$7,000 to Samuel W. Worthington to be by him invested and held in trust for the use of Mary E. L. Dickinson for life, and after her death for others. This \$7,000 was declared to be, until paid, a charge upon the lands which were devised to his sons, into whosoever hands the lands should go. This sum of \$7,000 has never been paid or invested, but Samuel W. Worthington procured from Mrs. Dickinson the paper called a release, which is designated in these proceedings as Exhibit T, and had it recorded; and it appears that subsequent encumbrancers have relied upon this paper as releasing the land from the payment of this charge.

The will does not expressly authorize any one to give an acquittance for this sum so charged upon the testator's land. The utmost

that could be claimed would be that, as the testator directed the money to be paid to Samuel W. Worthington, trustee, he was authorized to execute an acquittance and release of the land, and that a stranger who innocently relied upon such a release executed by him could not be injured by the fact that the money had not been actually paid. Conceding this to be so it does not touch the present case. There is no release or acquittance executed by Samuel W. Worthington upon which any one could have relied. Exhibit T is a paper signed and acknowledged by Mrs. Dickinson and by no one else, and is in fact nothing more than a statement made by her that the money had been invested to her satisfaction, and that she released the lands and the trustee from all liability therefor. This was a gratuitous and an idle statement on her part, not true in point of fact and of no effect whatever. She was not the person to receive the money or to invest it; she was not even to be consulted as to its first investment. The paper was nugatory for any purpose whatever. Granting that, although she was a married woman, she could, under the powers given to her by the will, have receipted in advance for all the interest thereafter to accrue during her life-time, or could have assigned her life interest absolutely, such effect cannot be given to this paper, as it does not, upon its face, purport to do any such thing. Nor is it a paper which is evidence of any purpose or contract on her part to do anything with reference to said money charged on the land, or the interest thereon, which is within the limits *jus disponendi* under the will.

I am, therefore, of opinion that the \$7,000 charged by the testator upon his lands stands just as if the paper, Exhibit T, had never been executed.

2. With regard to the \$2,000 held by Samuel W. Worthington as trustee for Mrs. Dickinson, and invested by him in a mortgage executed to him by Thomas L. Worthington upon a part of the land devised by the testator, which mortgage was subsequently released by said trustee without Mrs. Dickinson joining in the release, I think it plainly appears from the express limitations contained in the bill that the trustee had no power "to collect the amount due on the mortgage, and release the same," without the consent of Mrs. Dickinson, evidenced by her being a party to the deed of release, and signing, sealing, and acknowledging it.

This mortgage, therefore, stands unaffected by the release, (Exhibit L.)

3. With regard, however, to the \$2,000 held by said Samuel W. Worthington as trustee for Mrs. Thompson, and in like manner invested by him in a mortgage of part of said lands, I do not find in the will the same limitation upon the power of the trustee to release the mortgage. The trustee having made the loan and taken the mortgage to secure it, and the loan being long overdue, he would, in the absence of some express restriction, have the right to receive the money, and the power to execute a release of the mortgage. He did execute a proper formal release, (Exhibit V,) in which he recites that the entire loan and the interest thereon had been fully paid, and that the mortgagor was entitled to have the land released. Upon this release the subsequent encumbrancer testifies that he relied, and as there is no evidence of facts which should have put him upon inquiry as to the truth of the recitals, I am of opinion that he had a right to rely upon it.

It is urged that as it was recited in the mortgage that a promissory note had been made and delivered by the mortgagor to the trustee for the \$2,000 loaned, and as it does not affirmatively appear that, when the release was executed the note was given up to be cancelled, and as it is now known that the loan was not in fact paid, that the presumption is that the note was not surrendered; and it is contended that as the mortgage was merely security for the note, the release without a surrender of the note was ineffectual, and that the respondent Wight was guilty of laches in not having required the production and surrender of the note. It is true that if a promissory note, secured by a mortgage, has been passed by the mortgagee to a third party the subsequent release of the mortgage by the mortgagee without surrender of the note is void, upon the principle that the assignee of the note is entitled to the security given for its payment, and that the assignment of the debt operates as an assignment of the mortgage. In this case, however, it does not appear what has become of the note. It could not have been assigned, and, if in existence, it must have been in the hands of the trustee at the time he executed the release. The presumption is that he surrendered or cancelled it. Nor does it appear to me that the fact that this release, which bears the same date as the mortgage to Wight, was not acknowledged by the trustee until the next day, alters its effect. It is clear from Wight's testimony that it was a condition precedent to the loan of the money by him that this release should be first executed and the property relieved from the mortgage thereby intended to be released; and

as this release and the mortgage to Wight were recorded at the same moment, it is evident that Wight did, as he testifies he did, rely upon this release in making the loan.

4. The next question is as to the validity of the deed executed by Samuel W. Worthington, trustee, to Thomas L. Worthington, (Exhibit Q,) purporting to convey the one-fifth interest in the lands which had descended to Martha E. Worthington under the terms of the will by the death of her brother George. Proceedings were instituted in equity in the circuit court for Baltimore county, and a decree was obtained ratifying the sale of the said one-fifth interest to Thomas L. Worthington for \$2,000. This decree was dated the sixteenth of July, 1867, and authorized Samuel W. Worthington, as trustee, on the payment of \$2,000, to execute a deed to the purchaser for the interest in the land sold to him. On the same day, however, there was filed in said cause the petition of the trustee asking the court to direct him to invest the \$2,000 of purchase money in a mortgage to be executed by the purchaser upon the property so sold, and on the same day the court did pass an order directing the trustee to invest the \$2,000 of purchase money in a mortgage from the purchaser of the property sold to him, "to be executed simultaneously with the deed." The deed was dated the sixteenth of July, 1867, acknowledged the twenty-seventh of April, 1869, and recorded the fifth of March, 1870. No mortgage was ever executed as directed by the order of the court, and, although the deed recites that the trustee had received the purchase money, it now appears that it never has been paid.

The order of the court of the sixteenth of July, 1867, is a peremptory direction to the trustee to invest the money in a mortgage of the property sold, and take the mortgage simultaneously with the execution of the deed; and it would seem that the trustee, having no discretion left to him, could not, without further order of the court, disregard its direction and accept the purchase money in cash.

The order of the sixteenth of July had changed the terms of the decree, and had changed the duties and powers of the trustee; and if thereafter the purchaser should offer to pay the money and refuse to give a mortgage, it might be quite to the disadvantage of the *cestui qui trust*, and the trustee would have no right to accept the money without first obtaining the direction of the court. But whether the trustee could or could not, upon actually receiving the purchase money instead of the mortgage, have given an effectual deed without further order of

the court, it appears that the purchaser did get the deed without paying anything, and I am of opinion that there was sufficient disclosed by the records of the court to put any one dealing with property upon his guard, and upon inquiry as to why it was that the mortgage had not been given.

The deed itself is dated the sixteenth of July, 1867, the very day that the order was passed requiring that the mortgage should be taken simultaneously with its execution; and, although the deed was not acknowledged until long afterwards, I think a duty was imposed upon any one dealing with the property, not finding the mortgage upon the land records, to know why it had not been given, and to satisfy himself, at least, that the purchase money had actually gone into the hands of the trustee. The order directed that the mortgage should be taken simultaneously with the giving of the deed; and the executing of the deed, without taking the mortgage, was plainly a violation of his duty by the trustee, and subsequent purchasers or encumbrancers had no right to rely simply upon his acknowledgment in the deed that the money had been paid.

I must hold, therefore, that the lien for this \$2,000 of purchase money has not been lost by the execution of the deed by the trustee.

It appearing, upon the whole case, that the complainant is entitled to the relief prayed for in the bill, I will sign a decree for the sale of the lands as prayed.

OVERTON, Trustee, v. MEMPHIS & LITTLE ROCK R. Co., as reorganized.*(Circuit Court, E. D. Arkansas. March 24, 1882.)***1. EQUITY—RELIEF, WHEN REFUSED—DISPUTED EQUITABLE CLAIM.**

Where the relief sought is founded upon a disputed equity, a court of equity will with great reluctance and hesitation take the possession from a defendant holding a clear legal title. So, where none of the actual holders of the stock or bonds of a railroad company who would be affected similarly with the plaintiff were before the court, the court ought to hesitate before appointing a receiver, on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock.

2. SAME—RECEIVER, WHEN NOT APPOINTED.

It is not the province of a court of equity to take possession of the property and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding.

In a cause pending in the supreme court of Arkansas, on appeal from the chancery court of Pulaski county, wherein the state was complainant and the above-named railroad company (as intervenor) was defendant, that court decreed foreclosure of a mortgage executed by a former company, owner at the time of the road, and ordered a sale of the road and rolling stock. Four days after this decree was rendered, complainant filed in this court his bill claiming to be entitled to some deferred stock of the railroad company, and praying the court to compel issue thereof. The company disputed his right to such deferred stock. Afterwards complainant filed an amendment to his bill, setting up the judgment of the supreme court and decree for sale of the road; the rapid approach of the day of sale; that the officers of the defendant company were taking no steps to prevent a sale; alleging his inability to raise the large sum required to pay the judgment; averring that he was informed and believed that certain holders of the bonds of the defendant railroad company would raise the money "if they could be assured of repayment by reception of the income of the property," and praying the appointment of a receiver with power to borrow the money, pledging the income of the road, and pay the judgment.

T. B. Turley and W. M. & G. B. Rose, for complainant.

B. C. Brown, for defendant.

CALDWELL, D. J. 1. The plaintiff is not the legal owner or holder of any of the stock or securities of the defendant company. He

claims in his bill to be equitably entitled to \$1,500,000 of deferred stock, but his right to this is disputed by the company.

"Where the relief sought is founded upon a disputed equity, a court of chancery will with great reluctance and hesitation take the possession from a defendant holding the clear legal title." *Schenck v. Peay*, 1 Woolw. 175.

Not one of the actual holders of the stock or bonds of the company, who would be affected similarly with the plaintiff by a sale of the road under the decree, are before the court. In view of this fact the court ought to hesitate before appointing a receiver on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock.

2. While the bill alleges the trustee is unable to raise the money to provide for the decree "on his own account," it does not allege that his *cestui que trust* cannot do so. And it does allege "that the bondholders of said road and others interested therein, as he is informed and believes, would and will advance the money to provide for said decree, if they had any assurance that it would be refunded to them out of the earnings of the road." No order of this court, in advance, is necessary to give this assurance, or for the protection of such of the holders of the stock and securities of the company as may provide the money to day the decree or purchase the property at the sale. Upon payment of the decree they are entitled to be reimbursed their money, and, to this end, to be subrogated to all the rights of the state under the decree, or, upon a purchase, they are entitled to all that a sale under the decree can impart, including the right to the immediate possession, and, of course, the right to receive the earnings of the road, as against all junior encumbrancers, until they are reimbursed, and a receiver of this court would have no greater powers.

3. Suppose the receiver to be appointed and the proceeding to run its course, as contemplated in the bill, it is quite obvious the court would be burdened with the administration of the business affairs of the company for a long period. Undoubtedly there are cases in which a court of equity may, through its receiver, take possession and control of the business of corporations and individuals. But it is a jurisdiction to be sparingly exercised. None of the prerogatives of a court of equity have been pushed to such extreme limits as this, and there is none so likely to lead to abuses. It is not the province of a court of equity to take possession of the property, and conduct the business of

corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding. If, as in this case, the loss or danger can be averted by the lawful action of the suitor, or those he represents, he cannot successfully invoke the exercise of the extraordinary powers of a court of equity, because that course would be more agreeable or convenient. Should the plaintiff, or those he represents, pay off the decree, or purchase under it, the rights and equities thus acquired will be clear, and within the protection of a court of equity.

4. The danger that all holders of stock or securities junior to the terms of the decree will be cut off by a "stranger, or third party," purchasing at the sale, is too slight to be seriously considered. The disproportion between the value of the property and the amount of the decree precludes the idea of any one being permitted to purchase the property discharged from a trust in favor of the stock and bondholders. It is the duty of the directory to protect the interests of the stockholders of the company, and they are not likely to incur the liability that a neglect of that duty would impose. But should they do so, it is, as we have seen, within the power of the plaintiff, and other parties in interest, to protect themselves against loss by reason of the fraud or neglect of the directory. And, if the decree is not satisfied, and the property goes to sale, it is as certain as any future event can be, that it will be purchased by or for the company, or by or for some one or more of the stock or bondholders, whose relations to the company and the other stockholders will be such that they will take the property charged with a lien in favor of the latter.

Motion for receiver denied.

SOUTHERN EXPRESS CO. v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN
RY. CO.*

(Circuit Court, E. D. Missouri. March 25, 1882.)

In Equity. Final decree.

The opinion in the above-entitled cause was delivered on the twenty-first day of February, 1882. A full report will be found at page 210, *ante*.

The following final decree was rendered in the case, by Judge McCrary, on the twenty-fifth day of March, 1882:

FINAL DECREE.

And now this day come the parties aforesaid, and by their counsel, then and there present, bring on this cause to be heard on the pleadings and proofs, and the same were then and there presented to the court, and the argument of counsel for the respective parties is heard, and the said cause is then and there submitted, and due deliberation having been thereupon had,—

It is by the court ordered, adjudged, and decreed as follows:

(1) That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the court to take notice of the same as distinct from ordinary transportation of the large mass of freight usually carried on steam-boats and railroads.

(2) That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept, while in transit, in the immediate charge of the messenger or agent of such express company.

(3) That to refuse permission to such messengers or agents to accompany such property on the steam-boats or railroads on which it is to be carried, and to deny to them the right to the custody of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steam-boats and railroads for the transportation of such property so under the control of such messengers or agents.

(4) That the defendant, its officers, agents, and servants, have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof, unless such inspection be granted or such knowledge be afforded.

(5) That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transporta-

*Reported by B. F. Rex, Esq., of the St. Louis bar.

tion of such messengers or agents as of the express matter in their custody and under their control.

(6) That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contracts in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the twenty-fifth day of May, 1880; that such intention and purpose were restrained by the preliminary injunction order of the court, which said injunction order was afterwards modified, as appears in the record.

(7) That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself, or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains.

(8) That the plaintiff keep and render monthly a true account of the services performed for it by defendant, and pay therefor at the rate hereinafter specified, on or before the fifteenth of each month after the date hereof, for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities, or payment therefor at the end of every train, or in any other manner than as is herein provided; and that plaintiff execute and deliver to the defendant a bond in the sum of one hundred and fifty thousand dollars, (\$150,000,) conditioned well and faithfully to make such payments as are herein provided, and with surety to be approved by a judge of the court.

(9) That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff as herein specified for a just and reasonable compensation.

(10) Whereas, it is alleged by complainant that, since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter; therefore, it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

(11) That the defendant, its officers, agents, servants and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with, or disturbing in any manner, the enjoyment by the plaintiff of the facilities provided for in this decree to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it, for the transaction of the business of the plaintiff, and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or rejecting any of its express matter or

messengers from the depots, trains, cars, or lines of the said defendant, as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport, for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever; the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding 50 per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals, reserving to either party the right at any time hereafter to apply to this court, according to the rules in equity proceedings, for a modification of this decree, as to the measure of compensation herein prescribed.

It is further ordered, adjudged, and decreed that the defendant pay the costs to be taxed herein, and an execution on a fee bill issue therefor.

GEO. W. McCrARY,
Circuit Judge.

PROVIDENCE SAVINGS BANK v. HUNTINGTON and others.*

SAME v. SAME.*

(*Circuit Court, E. D. Missouri.* March 9, 1882.)

1. STATUTE OF FRAUDS—VOLUNTARY CONVEYANCES.

A voluntary conveyance is valid as to existing creditors if it leaves sufficient unencumbered property in the debtor's hands to satisfy such creditor's claims.

Smith v. Kerr, 2 Dill. 50, 20 Wall. 31.

In Equity.

The above-entitled causes, being of a like nature, were consolidated for the purposes of trial.

The bills allege, in substance, that Robert Baker, one of the defendants, made a voluntary conveyance of several pieces of real property, of which he was seized in fee, to his daughter Cornelia, wife of E. A. Huntington, on the twenty-second day of May, 1872; that at the time of said conveyance said Baker was indebted in large amounts to the plaintiff and others, and was "in an embarrassed condition and unable to discharge his obligations," and shortly after the date of said conveyance became insolvent, and so remained, and was insolvent on the twenty-ninth day of January, 1878; that on said twenty-

*Reported by B. F. Rex, Esq., of the St. Louis bar.

ninth day of January the plaintiff recovered a judgment against said Baker in the circuit court of the city of St. Louis, on an indebtedness which existed at the date of said conveyance; and that plaintiff has been unable to collect said judgment, and that it remains unsatisfied.

The prayer of the bills is that said conveyance be deemed fraudulent and void.

The bills do not allege that the conveyance in question was fraudulent, or that it was made with intent to hinder or defraud creditors.

The answer admits that the conveyance was voluntary, and was made as an advancement in consideration of love and affection, but denies that the debt on which the complainant's judgment was rendered existed against said Baker, or that Baker was embarrassed or unable to meet this obligation at the time said conveyance was executed.

The plaintiff filed general replications.

At the trial it was proved that the land conveyed by Baker to his daughter was only worth about \$25,000, and that at the time he executed the conveyance he was worth, in unencumbered real estate, situated in the city and county of St. Louis, \$300,000; that his unsecured indebtedness amounted to less than \$15,000, and his secured indebtedness to about \$95,000; and that the latter was secured in real estate worth about \$160,000.

The defendants also introduced evidence tending to prove that the debt upon which the plaintiff's judgment was founded did not exist at the time said conveyance was made; but the case was decided without reference to it.

Hayden & Glover, for plaintiff.

Garland & Pollard, for defendants.

TREAT, D. J. The rule by which cases of this kind are to be determined, have, in the light of modern jurisprudence, become too well settled to be overthrown. The views of this court were fully expressed and affirmed by the United States supreme court in a Missouri case. There is nothing in the facts presented to take the case out of those rulings.

Bills dismissed, with costs.

UNITED STATES v. BARTOW.*

(Circuit Court, S. D. New York. February 18, 1882.)

1. INDICTMENT UNDER SECTION 5392, REV. ST.—PERJURY—BANK OFFICER'S REPORT.

The oath of a cashier of a national bank, in a report to the comptroller of the currency, is a declaration within the meaning of section 5392, Rev. St.; as such report, so verified, is required by the provisions of section 5211.

2. SAME—SAME—SAME—CERTAINTY OF PLEADING.

Where the indictment contained the averment that such report was "made to the comptroller of the currency, and verified, as aforesaid, as by law required," *held*, upon a motion to quash, that such averment was sufficiently certain to sustain the indictment.

BENEDICT, D. J. This case comes before the court upon a motion to quash made after plea. It cannot, therefore, prevail unless the insufficiency of the indictment is so palpable as to satisfy the mind that no judgment can be rendered in case of conviction. The offence sought to be charged is the offence created by section 5392 of the Revised Statutes. The act charged is the verification of a report of the condition of the National Bank of Fishkill by the accused as cashier of such association. The method of framing the indictment is far from satisfactory. Still, I think it not impossible to consider the language employed sufficient after verdict to sustain a finding that the accused took an oath that a report of the condition of the National Bank of Fishkill subscribed by him is true, and wilfully and contrary to his oath stated in such report material matter which he did not believe to be true. Such a report is, in my judgment, a declaration within the meaning of section 5392.

The laws of the United States, § 5211, require every national bank to make to the comptroller of the currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of the association. In this indictment there is no specific averment that the report in question was made in pursuance of a request or requirement of the comptroller, or according to a form prescribed by the comptroller; nor is there any averment that the comptroller ever requested a report from the National Bank of Fishkill. Because of this omission it is said that no offence is charged, inasmuch as the offence created by section 5392 can only be committed in a case in which a law of the United States authorizes an oath to be administered.

*Reported by S. Nelson White, Esq., of the New York bar.

But the act charged is the taking of the oath. The circumstances under which the oath was taken are introduced to show that the oath was authorized by law. Matter showing that the report which the accused verified by his oath was made in pursuance of a request from the comptroller of the currency, and in accordance with a form prescribed by him, would be, therefore, matter of inducement, and inducement does not, in general, require exact certainty. This indictment contains the averment that the report in question was "made to the comptroller of the currency and verified, as aforesaid, as by law required." I am not prepared to say that authority cannot be found for holding such an averment in regard to such matter sufficient after verdict to warrant judgment on the conviction. See *Rex v. Salisbury*, 4 T. R. 451; *Rex v. Bidwell*, 1 Den. C. C. 222.

The motion to quash is accordingly denied.

UNITED STATES *v.* BARTOW.*

(Circuit Court, S. D. New York. February 18, 1882.)

1. INDICTMENT UNDER SECTION 5209, REV. ST.—SUFFICIENCY OF.

An indictment under section 5209, Rev. St., which charges the making of a false entry in a report with intent to deceive the comptroller of the currency, cannot be sustained, as he is not an agent appointed to examine the affairs of a national bank within the meaning of the statute.

2. SAME—SAME.

Where, in an indictment under said section, a bank officer was charged with making a report with intent to deceive "whereby, by means of a false entry therein by him made," *held*, upon a motion to quash, that this language might be sufficient to support a finding that he made a false entry in a report within the meaning of the statute.

BENEDICT, D. J. This is a motion to quash an indictment framed under section 5209 of the Revised Statutes, by which statute it is made an offence for any cashier of a national bank to make any false entry in any report or statement of the association with intent to defraud the association, or to deceive any officer of the association or any agent appointed to examine the affairs of such association. The indictment is curiously framed, and under other circumstances I should have little hesitation in directing it to be quashed. But the lapse of time since the date of the alleged offence is such that it is now too

*Reported by S. Nelson White, Esq., of the New York bar.

late to frame a new indictment. The defendant has long since pleaded to the indictment as it stands, and the motion to quash at this time was permitted only as a matter of favor, to enable the defendant to point out if he could defects that would necessarily be fatal on a motion in arrest of judgment. The present motion must therefore fail, unless the indictment disclose defects that would clearly be fatal after verdict. Such a defect plainly appears in the first, second, and third counts, where the only intent charged is an intent to deceive John I. Knox, the comptroller of the currency. The intent made by the statute an ingredient of the offence is an intent to defraud the association, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association. The comptroller of the currency is not an agent appointed to examine the affairs of a national banking association within the meaning of this statute. The first, second, and third counts of the indictment are, therefore, good for nothing.

The other counts are differently framed in regard to the intent. They are alike in form, and the only objection taken to them is that the substance of the charge in each is the making of a false report of the condition of the bank, whereas the offence created by the statute consists in making a false entry in a report. Upon this ground it is contended that no offence is charged in either of these counts. But while the wording of the indictment doubtless affords some ground for such a contention, it is not certain that the language employed would be held insufficient to support a conviction for making a false entry in the report. These are the words: "Whereby, by means of a false entry therein by him made." This language might be held to constitute an imperfect averment that the defendant made a false entry in the report described, and therefore sufficient to support a finding that the defendant made a false entry in a report within the meaning of the statute. Any doubts existing upon such a question, when raised, as in this case, should be left to be solved upon the motion in arrest of judgment.

The motion to quash is, therefore, denied.

UNITED STATES v. KEYES.

(Circuit Court, D. New Hampshire. March 13, 1882.)

1. CRIMINAL LAW—POSSESSION OF UNSTAMPED TOBACCO.

Every person who has in his possession, not in a manufactory, manufactured tobacco, in any quantity, unstamped, whether the same is refuse and worthless or otherwise, or whether it had been purchased to be remanufactured into snuff or not, or whether a tax had been paid on it prior to the passage of the act of congress making it criminal to have in possession unstamped manufactured tobacco, is liable for the penalty imposed in section 71 of the act of 1868, (15 St. at Large, 156.)

2. SAME—GIST OF OFFENCE.

The gist of the offence is having in possession unstamped manufactured tobacco, irrespective of the considerations of value, purpose, or payment of the tax.

3. SAME—POWER OF CONGRESS.

Congress has as much power to say that the tax shall be paid in a particular way,—that is, by stamps,—as it has to impose any tax, and all its requirements must be complied with.

On Motion for New Trial.

U. S. Atty. Role, for plaintiff.

Mr. Marston, for defendant.

CLARK, D. J. The respondent was indicted under the seventy-first section of the act of 1868, (15 St. at Large, 156,) for having in his possession on the first day of May, 1870, and from that time, in a certain barn, to the twenty-eighth day of the same May, and not in a manufactory of tobacco, or in a bonded warehouse, 200 pounds of manufactured tobacco, without the proper stamps affixed thereto, and was found guilty by the jury. It appeared in evidence that some time previous to May, 1870, the respondent purchased in Boston of Russell & Willey some 226 pounds of tobacco, the remnants of various lots, of which they had previously sold the balance. It was manufactured tobacco, in plugs, some "cavendish," some "navy," but damaged. The respondent paid 35 cents per pound for it, and it was packed in two barrels. When Russell & Willey sold it it was unstamped, and no taxes had been paid upon it. The respondent knew this and so purchased it. He gave his note in payment for it. When the note became due he declined to pay it, because the tobacco had been afterwards sold in violation of law, and complained of Russell for selling him unstamped tobacco, and caused him to be arrested. Russell settled with the officers by paying, by way of pen

alty or tax, such sum as was required, and was discharged. In May, 1870, a United States inspector of tobacco examined the store of the respondent in Concord, in this district, and found at the end of some boxes, which were opened and stamped, a "lump" or bunch of tobacco not in any box, and unstamped, containing some 20 or 25 pounds. He also examined the respondent's barn, which was some quarter of a mile away from his place of business, and there he found two barrels, one full and the other two-thirds full of tobacco; some of the same kind as the "lump" he had seen at the store; some "cavendish" in plugs, and some "navy"—different kinds; some loose; some in boxes; some in lumps, unstamped. There were 166 pounds of it,—some 60 pounds less than he had purchased of Russell & Willey. The respondent's counsel requested the court to instruct the jury:

(1) That if the tobacco was refuse and worthless, the remains of various lots accumulated by a dealer prior to the act imposing taxes on distilled spirits, tobacco, and for other purposes, "approved July 20, 1868," then the respondent is not liable for having said tobacco in his possession unstamped; (2) that if the tobacco was refuse and worthless, being the remains of lots which had been manufactured prior to the passage of said law of 1868, and the respondent bought it for the purpose of remanufacture into snuff and cigars, then the respondent is not liable, under this indictment, to the penalties imposed by the seventy-first section of said law, for having the tobacco in his possession unstamped, and in the condition in which he bought it; and, (3) that if the government tax had been paid on said tobacco prior to the time when it is alleged in the indictment that the respondent had the same in his possession unstamped, then the respondent is not liable to the penalties imposed by said law of 1868 for having it in his possession unstamped.

The court refused these instructions, and charged the jury that if the respondent had in his possession manufactured tobacco unstamped in any quantity, at the time charged in the indictment, whether the same was refuse and worthless or otherwise, they should find the respondent guilty; that whether it was the remains of various lots that had been manufactured before the passage of the act was immaterial, or whether the respondent bought it to remanufacture into snuff or cigars. The respondent, by his counsel, moves for a new trial, because the court refused to give the instructions prayed for, and because of the instructions given. The respondent's counsel contends:

(1) That if the tobacco was refuse and worthless, the remains of various lots accumulated by a dealer prior to the act of July 20, 1868, then the defendant is not liable; (2) that if it were such tobacco as aforesaid and thus

accumulated, and the respondent bought it for the purpose of remanufacture into snuff or cigars, then the defendant is not liable for having it in his possession, as he bought it; and, (3) that if the government tax had been paid upon it prior to the time alleged in the indictment, then the defendant is not liable.

The verdict of the jury settles conclusively the fact that this was manufactured tobacco. The Laws of 1868, July 30, § 78, (15 St. at Large, 159,) provide that "after the first day of January, 1869, all smoking, fine-cut chewing tobacco, or snuff, and after the first day of July, 1869, all other manufactured tobacco of *every* description, shall be taken and deemed as having been manufactured after the passage of this act,"—that is, the act of July 20, 1868; so that this tobacco, whenever manufactured, being on hand after the time fixed by the statute, must be taken and deemed to have been manufactured since the passage of that act, and be treated as such. If actually manufactured before that time, it must be treated as if manufactured afterwards, and the court could not instruct the jury that the defendant was not liable if the tobacco was manufactured before. The law settled that matter, and it was a matter immaterial to the jury, as the judge who tried the cause charged. Again, the statute of July 20, 1868, § 71, under which section the respondent is indicted, (15 St. at Large, 156,) provides that any person who shall use, sell, or offer for sale, or have in possession, except in the manufactory or in a bonded warehouse, any manufactured tobacco, or snuff, without proper stamps affixed and cancelled, shall on conviction thereof be liable to the penalty therein prescribed. The language is *any* manufactured tobacco. There is no exception of refuse or worthless tobacco, or of tobacco to be remanufactured, or of tobacco on which the tax has been paid, or any other kind. Therein is included every kind of manufactured tobacco, no matter what its value or condition, or what the person who has it in possession is about to do with it, if it be out of the manufactory, and not in a bonded warehouse, it must be stamped and the stamps cancelled.

The government has imposed a tax on all kinds of manufactured tobacco, even refuse scraps and sweepings; have required it to be put up in a particular way or ways, and to be stamped with stamps, for the payment of the tax, and the stamps cancelled; and have imposed this penalty, not for having in possession manufactured tobacco on which the tax has been paid, but manufactured tobacco on which

stamps have not been placed and cancelled. Congress has as much power to say the tax shall be paid in a particular way,—that is, by stamps,—as it has to impose any tax, and all its requirements in that behalf must be complied with. Considerations of value and purpose, and payment of the tax, might be addressed to the prosecuting officers, but this provision of the statute is quite too plain and imperative for the court to limit its obvious meaning.

The instructions of the court were correct, and there must be judgment on the verdict.

UNITED STATES v. LONG.

(Circuit Court, E. D. Georgia. December, 1881.)

1. EMBEZZLEMENT BY POSTAL EMPLOYE—VERBAL OMISSIONS IN STATUTE.

Section 279 of the act approved June 8, 1872, itself a revision, has been transcribed *verbatim* into section 5467 of the Revised Statutes, until the latter and concluding part of the section is reached, when the words "every such person shall, on conviction thereof, for every such offence," have been omitted, and no penalty is prescribed for any offence under that section save for stealing the valuable contents of a letter. The section does not cover the offence of embezzling a letter with valuable contents.

Indictment for Embezzling Letters by a Person in the Postal Service. On motion to quash.

E. Dunnell, Dist. Atty., for the United States.

J. Lyons, for defence.

PARDEE, C. J. In the revision of the laws to make up what are now known as the Revised Statutes, an error has been undoubtedly made in regard to the crime of embezzling letters by persons employed in the postal service. Section 5467, Rev. St.

Section 279 of the act approved June 8, 1872,—which act was a revision,—has been transcribed *verbatim* until the latter and concluding part of the section is reached. The words "every such person shall, on conviction thereof, for every such offence," have been omitted, and as the section now reads no penalty is prescribed for any offence under that section, save for stealing the valuable contents of a letter by an employe in the postal service.

By no grammatical construction, nor by any reasonable intentment, can the section be made to cover the offence of embezzling a letter with valuable contents, such as is charged in the indictment

now under consideration. I have no doubt in the matter; but if the question were doubtful, I should feel constrained to give the doubt in favor of the prisoner.

An entry will be made sustaining the motion to quash.

SIXTY-FIVE TERRA COTTA VASES, etc.

(District Court, S. D. New York. February 20, 1882.)

1. DUTIES ON IMPORTS—FREE LIST—COLLECTIONS OF ANTIQUITIES.

The item in the "free list" of section 2505, Rev. St., making free "cabinets of coins, medals, and all other collections of antiquities," embraces all "collections of antiquities," within the ordinary meaning of those words. It is not limited to "collections of antiquities" *ejusdem generis* with coins and medals. This item of the free list, dating back to the tariff of 1846, has ever since continued without change, and must be held to have the same meaning now that it had then.

2. SAME—EXTENSION OF FREE LIST—ACT OF 1870 CONSTRUED.

The addition to the free list, in the act of 1870, of the item "collections of antiquity, specially imported, and not 'for sale,'" (16 St. at Large, p. 265, § 22,) is by that act declared to be designed to extend the free list. It cannot, therefore, by implication, be suffered to change the meaning of the other item, which still remains in the free list, respecting "collections of antiquities," nor make them dutiable now, when not dutiable before.

3. STATUTORY CONSTRUCTION—PROVISIONS NOT REPUGNANT.

Though this construction leaves this item of the act of 1870 superfluous, the practice and the policy of the government, for at least 24 years previous, admitting "collections of antiquities" free, should not be reversed except upon some new provision repugnant to the old; and this item in the act of 1870 is not repugnant.

4. ARTICLES EXEMPT FROM CUSTOMS DUTIES.

The articles in question being held to be exempt from duty, no legal injury from the claimant's acts resulted to the United States, and a verdict was directed for the claimant.

This was an information filed for a condemnation of a "collection of antiquities" seized by the customs officer for alleged fraudulent importation with the intent to evade payment of legal duties.

It was admitted upon the trial that the articles in question constituted a "collection of antiquities." They were imported from France in October, 1878, designed for sale. Being supposed to be free of duties they were entered as free and warehoused. A question being raised as to their being dutiable, the case was referred to the treasury department, which, after considerable controversy, ruled that they

were dutiable; and in June, 1879, this determination was sustained in an opinion of the attorney general. 16 Opinions Atty. Gen. 354. Thereupon the goods were withdrawn for exportation to Canada by Fenardent, the agent of the owner, to whom they had been consigned, and upon this exportation the agent swore that they were not designed for any place within the United States. At Montreal the owner, Mr. De Morgan, took charge of the collection. Not long afterwards they were again imported into the United States, through his brokers, by way of Rouse's Point, and entered as "not for sale." On arrival at New York they were exhibited as the De Morgan collection, ticketed "not for sale." Some of the articles, nevertheless, were sold to the Pennsylvania Academy of Fine Arts, in Philadelphia, and sent there after being again sent to and imported from Montreal. The rest of the articles, being discovered to be the same that had formerly been assessed for duties, were seized in this proceeding for an alleged fraudulent attempt to evade the legal duties.

Upon the close of the evidence, and the admission by the government that the articles constituted a "collection of antiquities," a verdict was directed for Mr. De Morgan, the claimant, upon the grounds stated in the following opinion of the court.

William C. Wallace, Asst. Dist. Atty., for the United States.

Coudert Brothers, for claimant.

BROWN, D. J. During the recess I have given the questions in this case such examination as the short time has allowed, and feel compelled to direct a verdict for the claimant, for reasons which I will briefly state. The articles claimed to be forfeited confessedly come within the description of a "collection of antiquities." They were exhumed by or under the direction of the claimant, De Morgan, were imported here by him from France, and designed for sale; but, owing to a controversy with the custom-house, they were re-exported to Canada, and afterwards again imported by way of Rouse's Point, and exhibited as the De Morgan collection, "not for sale." Notwithstanding this, it is proved that a number of the articles were sold by De Morgan's agent, and I shall assume, for the purpose of this decision, that the collection was in fact designed to be sold if purchasers could be found. Section 2505 of the Revised Statutes enumerates the articles of "the free list" which it declares shall be exempt from duty. Upon this list I find two distinct clauses relating to articles of this character—the first, "cabinets of coins, medals, and all other collections of antiquities." In a subsequent portion of the free

list we find "collections of antiquity, specially imported, and not for sale."

Assuming that the articles in question were originally imported for sale, and were in fact designed to be sold, upon the second importation from Canada, it is claimed on behalf of the government that they are not covered as free by either of the sections of the free list quoted—*i. e.*, not by the last, since they were in fact for sale; and not by the first, on the ground that that clause is to be interpreted *ejusdem generis* as referring to articles similar to "coins or medals." The reason urged for such a limited construction of the first clause above quoted is in order to give some substantial effect to the latter clause. If these two provisions had been originally enacted together as parts of one statute, there would be ground for this construction; but an examination of the prior legislation satisfies me that this construction is unsound in this case. The second provision, "collections of antiquity, specially imported, and not for sale," was first enacted by the act of July 14, 1870, (16 St. at Large, 265,) which, by section 22, declares that "in addition to imported articles now by law exempt from duty, and not herein otherwise provided for, the following articles hereinafter enumerated and provided for shall *also* be free," among which is found "collections of antiquity, specially imported, and not for sale." This section, it will be noticed, is expressly declared to be designed to extend "the free list" to additional articles, and it does so to a large extent. There is nothing in section 22, or any other portion of the act of 1870, "otherwise providing" for the articles in question. If they were free by the pre-existing law, there is nothing in the act of 1870 which declares them dutiable, and the declared general purpose of that act to extend "the free list," and not to restrict it, should prevent any construction which would make free goods dutiable by implication merely.

The clause first quoted from "the free list," *viz.*, "cabinets of coins, medals, and all other collections of antiquities," has existed without change, and in the same identical words, ever since the tariff of 1846, (9 St. at Large, 49.) It was re-enacted in the tariff of 1857, (11 St. at Large, 194,) and in the tariff of 1861, (12 St. at Large, 194,) and continued without change until incorporated in the same words in section 2505 of the Revised Statutes. Under this provision, which thus appears to have been in force for nearly a quarter of a century, it seems to me impossible to hold that the articles in question were not, prior to the act of 1870, clearly entitled to

free entry under the clause "all other collections of antiquities." The designation and description of the articles in question by this phrase is perfect. There is nothing that I find in the prior acts which would indicate any contrary interpretation, and the restricted construction now suggested could not possibly have been maintained prior to 1870. It is alleged, and not disputed, that never, until recently, have such collections been attempted to be made dutiable, and that the established practice was to admit them free, even after the act of 1870. The same practice was followed notably in the case of the Castellani collection, first brought over and exhibited at the centennial exposition at Philadelphia, in 1876, and afterwards exhibited at the Metropolitan Museum of Art. The articles are such as are not usually dealt in in commerce, and such as have no fixed or ascertainable commercial value. The provisions of the tariff laws for the appraisement and assessment of duties are of necessity almost impossible to be practically applied to them. They could not by possibility be any important source of revenue, and they are articles which, in other provisions of the tariff law, the government has shown a desire to encourage the importation of, free of duty, in the interests of education and the fine arts.

Such being the law, the practice, and the policy of the government for at least 24 years before the act of 1870, under the provision above quoted from the act of 1846, making free "all other collections of antiquities," some more definite indication of a purpose to make such collections dutiable must be found than is contained in the act of 1870, which is expressly declared to be designed to extend, and not to restrict, the free list before they can be held dutiable. If it be said that this would leave the clause in question in the act of 1870 of no practical effect, it may be replied that this is not the first or only instance of superfluity, or unnecessary reiteration, in the items of the tariff legislation. It is enough that this act does not profess and was not designed to make anything dutiable which was not dutiable before. It is in no degree incompatible with the former provision. Though narrower in its scope and in reality superfluous, it is not repugnant to the former provision, and hence cannot be deemed a repeal of it, contrary to the expressed general design of the act, nor a ground for now placing any new or more restricted construction upon it than that which before properly belonged to it. *Wood v. U. S.* 16 Pet. 342, 363; *Davies v. Fairburn*, 3 How. (U. S.) 636, 646; *U. S. v. Tynen*, 11 Wall. 92. I hold, therefore, that the articles in question were not dutiable, and were entitled to free entry.

In this point of view, the collection not being dutiable, the United States would not be legally defrauded, even though the means which the claimant used to change the *status* of his collection by exporting them to Canada was circuitous, and would have been blamable if the United States would have been legally injured thereby. Under the act of 1874 no forfeiture can be enforced except upon an actual intent to defraud the United States. Hence, unless the acts complained of involved a loss of duties to which the government was entitled, there could be no legal injury to the United States, and hence no actual intent to defraud them. The claimant and his agent had from the first protested against the claim that this collection of antiquities was dutiable, and, as I hold that it was not dutiable, a verdict must be directed for the claimant.

GREENWALT v. TUCKER and others.*

(Circuit Court, E. D. Missouri. March 27, 1882.)

1. PRACTICE—TRIAL UPON AGREED STATEMENT OF FACTS—FRAUD ON JURISDICTION—NEW TRIAL.

A new trial may be granted at the instance of a defendant against whom judgment has been rendered in a case tried upon an agreed statement of facts, upon proof of evidence having been brought to his knowledge after the trial, which he could not have previously discovered by the use of due diligence, showing the perpetration by the plaintiff of a fraud on the jurisdiction of the court.

2. SAME—JURISDICTION—FRAUD UPON.

The transfer by a blank deed *mala fide*, without consideration, of the title to land in one state to a citizen of another, for the purpose of bringing suit in a federal court, will not enable the grantee to maintain a suit in ejectment in such court.

Motion for a New Trial.

Monk & Monk, for plaintiff.

Charles Gibson, for defendants.

TREAT, D. J. This is an action of ejectment against three defendants, charging them with being in possession of the premises. There was a joint answer, in which there was no denial of the joint possession as averred; and hence the suggestion that the judgment for damages against all the defendants was erroneous, has no foundation in law or in the pleadings or in the facts agreed.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

This case was heard on an agreed statement of facts, which has the force of a special verdict. The plaintiff contends that, therefore, nothing is open for consideration or review on this motion, except the conclusions of law upon such agreed statement. That point would be well taken if the motion embraced only what had heretofore been before the court, but it urges, supported by affidavits, that from facts brought to the knowledge of defendants since the trial, and which could not, by due diligence, have been previously ascertained, a fraud on the jurisdiction of the court had been perpetrated in this, to-wit: That the plaintiff had no interest in the controversy; that one Reinders, having the tax title in question, executed and acknowledged a deed in blank as to the grantee; that he left that paper with his attorney "for collection," (whatever that may mean;) that said attorney filled the blank with the name of the non-resident plaintiff for the mere purpose of bringing suit in her name in the United States court, she not having paid any consideration therefor. The question involved is not free from the embarrassments arising from several decisions, mainly concerning the transfer of promissory notes, etc. Under the judiciary act (1789) the transfer of such notes, etc., even *bona fide* and for value, was subjected to a restriction, in order to avoid an attempt to draw into the federal courts the adjudication of questions therein which could be as well and ought to be determined in the state courts, in which and under whose laws said contracts were made. Hence, that act denied to United States courts jurisdiction "of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." Under that act there have been many decisions, which it is not necessary to review.

The act of 1875, which has in many respects enlarged the jurisdiction of United States courts to an almost indefinite extent, contains this provision:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court, to recover thereon, if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange."

The change in the language of the act of 1875, on the subject quoted, may be only another form of expressing, in the light of decisions, what had been held to be the true interpretation of the act

of 1789. However that may be, the various acts of congress, and the better decisions thereunder, look to the preservation of the constitutional rights of citizens, to a judicial determination of their controversies in the federal courts, when fairly entitled thereto, and to a prevention of fraudulent or other contrivances, whereby the federal should supersede, or be substituted for, the more rightful jurisdiction of state courts.

There are several cases in which it is held that a *bona fide* transfer for value, although made for the purpose of giving jurisdiction to a federal court, should be held valid for jurisdictional purposes. Some of these cases are noted in *Marion v. Ellis*, 10 FED. REP. 410. If any of said cases have gone so far as to hold that a formal transfer, without consideration, for the mere purpose of having a federal court obtain jurisdiction, this court cannot assent to such doctrine. None of those cases, however, rightly considered, can properly be held to advance such a rule. The ruling in this case does not cover cases of *bona fide* transfers for value. The rule as to promissory notes, etc., under the act of 1789, and as to contracts under the act of 1875, are especially suggestive as to actions in ejectment, wherein the rights of the parties are ordinarily dependent, if title is involved, upon local statutes. It is a familiar principle that on questions of title the federal courts follow the interpretation given to state statutes by the court of last resort in the state. Its interpretation becomes a rule of property, and may be considered conclusive, not as in cases under the law merchant. Why, then, should not the state courts decide what is peculiarly in their province, unless a non-resident, who, in good faith, has a case for adjudication, chooses to come into a federal court? Can a nominal grantee, who has no real interest in the controversy, and to whom the realty has been transferred only for the purpose of bringing, in his name, a suit in the federal court, escape the consequences of a plea in abatement, or of an issue in the nature of a plea in abatement, whereby it may be shown that he is not the real party in interest, and, further, that his formal relation to the controversy was solely to effect a fraud on the jurisdiction? Can it be that, under pretence of a constitutional right as to citizenship, such frauds can be successfully perpetrated? There is, and long has been, a statute of Missouri in the following words:

"Any conveyance of land made by a citizen or citizens of this state to a citizen or citizens of any of the states or territories of the United States, without a valuable or *bona fide* consideration, and for the purpose of, or with

the view of, giving jurisdiction to any of the courts of the United States, and thereby to harass the occupants thereof, shall be and the same conveyance is hereby declared inoperative," etc.

Of course, no state statute can deprive a citizen of any of his rights under the federal constitution and laws, and if the Missouri statute just quoted were the only authority on the question before this court, no special weight could be given thereto where real controversies exist between a citizen of Missouri and a citizen of another state. The statute in question, so far as quoted above, merely announces a recognized rule in the federal courts, and proceeds to affix consequences for the attempted fraud. With those consequences this court has in this case nothing to do. The sole question is whether the transfer by a blank deed, *mala fide*, without consideration, of the title to a parcel of land in Missouri, for the purpose of bringing suit in this court, will enable such a grantee to maintain an action of ejectment here? If such be permissible, then, despite constitutional and legal provisions and restrictions, nearly every controversy can, through fraudulent schemes, be absorbed in the federal vortex, to the great damage and possible ruin of the adverse party through extraordinary costs and expenses. A citizen of Missouri, resident on the Iowa border, or resident on the Arkansas border, the title to whose land his neighbor disputes, can have the cause tried in his county, where the witnesses reside and where the *locus in quo* is known, according to the state laws, which are controllable in every forum. Why, then, should he be dragged far away from his home to contest his rights at great expense in another forum, instead of having the controversy judicially determined where it can be properly and inexpensively investigated?

In the case now under consideration this court rules that the motion for a new trial should be granted, for the following reasons:

- (1) That since the trial new testimony has been discovered, which by due diligence could not have been previously obtained.
- (2) That the *prima facie* showing of the defendants is to the effect that a fraud on the jurisdiction of this court has been practiced. No court with jealous regard to its duties will permit itself to be an instrument of fraud.

If the judgment in this case were sought to be impeached by summary or plenary proceedings, the court would be bound to take cognizance thereof. It is not necessary in all cases to bring a bill in equity to have a judgment set aside by fraud, but where the injured party proceeds promptly, as by a motion for a new trial or otherwise, the court will entertain the question, granting to the respective par-

ties due opportunity to be heard. On the present motion the court must act from the evidence before it, which, if true, shows a fraudulent judgment.

Motion sustained.

McCRARY, C. J., concurs.

GOLDMAN *v.* CONWAY COUNTY.

(Circuit Court, E. D. Arkansas. October Term, 1881)

1. COUNTY INDEBTEDNESS—WHEN STATUTE OF LIMITATIONS BEGINS TO RUN.

Where a county may be sued on its ordinary warrants and compelled by *mandamus* to levy a tax to pay them, the statute of limitations begins to run against such warrants from the date of their issue.

The plaintiffs' cause of action is ordinary county warrants, in the form prescribed by statute, issued before the thirtieth day of October, 1874, and presented to the county treasurer for payment, and by him indorsed "not paid for want of funds," more than five years before the commencement of this suit. The statute of limitations of this state declares that "actions on promissory notes and other instruments in writing," and all actions not specifically named in the act, shall be barred in five years after the cause of action accrued. Gantt's Digest, §§ 4125, 4129. The county pleaded the statute of limitations in bar of the action. The plaintiffs demurred to the plea.

Clark & Williams, for plaintiffs.

John Fletcher, for defendant.

CALDWELL, D. J. It is well settled that counties may plead the statute of limitations to actions founded on contracts and unliquidated demands. Dillon, Mun. Corp. § 533; *Baker v. Johnson Co.* 33 Iowa, 151. Such a plea may be interposed by a city to an action upon its notes. *De Cordova v. Galveston*, 4 Tex. 470. And in Louisiana it is held to be a good plea to an action on warrants issued by the police jury of the parish, which are analogous to, if not identical with, our county warrants. *Perry v. Parish of Vermilion*, 21 La. Ann. 645. And the statute begins to run against interest coupons attached to negotiable bonds, issued by municipal corporations, from the time they mature, although they remain attached to the bond which represents the principal debt. *Amy v. Dubuque*, 98 U. S. 470.

In this state counties are declared to be bodies corporate, with power to contract, and sue and be sued. This carries with it the right, when sued, to interpose every defence, legal and equitable, which it may have, including the statute of limitations. Not only are counties and all municipal corporations in this state within the protection afforded by the statute of limitations, but the state as well.

An act passed in 1855 and still in force declares that "lapse of time and statutes of limitations shall apply in suits against the state in like manner as suits against individuals, and may be pleaded and relied on with like effect." Section 5677, Gantt's Digest. This provision clearly indicates a state policy favorable to statutes of repose.

It is not seriously contested that a county may avail itself of this defence generally, but it is said not to be applicable to this class of paper. The force of this argument depends on the legal characteristics of these warrants under the laws of the state where issued.

Where a county is not liable to be sued on such warrants, and cannot be coerced to levy a tax for their payment, the statute probably would not run against them; and the cases of *Justices v. Orr*, 12 Ga. 137, and *Carroll v. Board of Police*, 28 Miss. 38, decide this and no more. But it is the settled law of this court that suit may be maintained on the class of warrants here sued on, and that under section 10 of article 16 of the constitution of 1874 the county court may by *mandamus* be compelled to levy a tax, not to exceed the limit prescribed by that section, to pay a judgment recovered thereon. *Shirk v. Pulaski County*, 4 Dill. 209, and note.

It is also settled that the orders of allowance, in pursuance of which such warrants are issued, have not the force of judicial judgments which estop or conclude the county, and that every holder of such paper takes it subject to all defences the county would have against the original payee. *Id.* They are *prima facie* evidence of indebtedness, upon which suit may be maintained, and the county coerced to levy a tax to pay them; and, where this is the law, they stand on the same footing, so far as relates to the statute of limitations, as bonds, coupons, or other demands which confessedly fall within the statute.

The warrants are due and payable on the day they are issued, and the statute runs from that date. If construed to be payable on demand, they would be payable at once, and the statute would run from their delivery. *Palmer v. Palmer*, 36 Mich. 487. When they were presented to the treasurer and indorsed by him, as then required

by law, the statute run from that date. It is no answer to the plea to say the treasury of the county never contained funds to pay the warrants. They were a legal tender in payment of taxes, and it was open to the plaintiff, by appropriate judicial proceedings, to compel funds to be placed in the treasury for their payment, and the right of action accrued when the warrants were issued, and not when there were funds in the treasury for their payment. Where a contract was made for work, payable out of a public fund, it was held the statute began to run from the time the work was completed, although the fund was not then raised. *Emery v. Day*, 1 Crompton, M. & R. Ex. 245.

The statute of limitations is one of repose. It is not based on presumption of payment, but on the impolicy of permitting state demands and transactions long past to be made the subject of judicial inquiry; and hence, neither indisposition nor inability of the debtor to pay is an answer to the plea. There is the same reason for giving counties the benefit of it as individuals. It is not always true that outstanding warrants have never been paid by the county, or that they ought to be paid. It not unfrequently occurs that they are issued illegally and without consideration, and the records of this court disclose the fact that warrants once redeemed were afterwards fraudulently withdrawn and put in circulation. The county is as likely to be deprived of the evidence of such facts by lapse of time as an individual, and for that reason should have the same protection from the statute. The form of warrant prescribed by statute contains no seal. There is no statute in terms requiring the clerk to affix the county seal to such instruments, and it is not affixed to the warrants sued on; so that the question of the period required to bar sealed instruments does not arise in this case.

The question whether warrants are valid without a seal was not argued and is not decided.

Demurrer overruled.

CISSELL v. PULASKI COUNTY.

(Circuit Court, E. D. Arkansas. October Term, 1881.)

1 COUNTY WARRANTS—CANCELLATION—NOTICE REQUIRED.

The notice required to be given of the order of the county court calling in warrants for cancellation and reissue, under a statute, in Arkansas, is for the benefit of the warrant-holders; and the county, which is suitor in the proceeding, cannot object that legal notice of such call was not given.

2. NOTICE—PUBLICATION, HOW PROVED—AFFIDAVIT.

The affidavit, to prove the publication of a legal notice in judicial proceedings, must show that the paper in which the publication was made is one authorized to publish such notices, and that the affiant sustains the relation to the paper required by the statute to authorize him to make the affidavit.

3. SAME—CONSTRUCTIVE SERVICE—FACTS MUST AFFIRMATIVELY APPEAR.

When it is sought to conclude a party by constructive service, by publication, every fact necessary to the exercise of jurisdiction, based on such service, must affirmatively appear in the mode prescribed by the statute.

4. SAME—DEFECTIVE PROOF CANNOT BE SUPPLIED BY PAROL TESTIMONY.

If the proof of publication contained in the record is defective, it is not competent for another court to receive parol testimony to supply the omission.

5. SAME—RECORD EVIDENCE OF NOTICE—PRESUMPTIONS.

The recital of due notice in the record of a proceeding, under special statutory authority, must be read in connection with that part of the record which gives the official evidence prescribed by statute. No presumption will be allowed that other or different evidence was produced; and, if the evidence in the record will not justify the recital, it will be disregarded.

A statute in Arkansas authorizes the county court at stated periods to call in all the outstanding warrants of the county "in order to redeem, cancel, reissue, or classify the same." An order for the call is required to be made by the county court, and notice of the time fixed for the presentation of warrants under the call must be given in a mode provided by the act, and all warrants not presented at or before that time are barred. The plaintiff sued on warrants of the defendant county reissued under a call in 1875. The county answered (1) that there was no sufficient notice of the call of 1875, and that the reissue of the warrants by the county court under the supposed call of that year was illegal and void; and (2) that a valid call was made in 1877, and the warrants in suit were not presented under that call as required by law and the order of the county court, and were therefore barred.

John McClure, for plaintiff.

B. C. Brown, for defendant.

CALDWELL, D. J. 1. It is not material to inquire into the regularity of the order for the call of 1875, or the sufficiency of the notice. The county court had jurisdiction to adjudicate upon the validity of the warrants, if the holder submitted himself to its jurisdiction for that purpose, whether the order for the call and notice were valid or not. The object of the order for the call and of giving notice is to acquire jurisdiction over and bind those who do not voluntarily submit their warrants for examination and adjudication. The county court has jurisdiction to pass upon the validity of a warrant or any other claim against the county at any time it may be presented to it by the holder. Section 595 (sixth subdivision) and section 611, Gantt's Digest. And when it invites holders to present their warrants and they do so, and the court acts upon them and there is no appeal taken from its judgment, the action is as binding in all respects on the county and the warrant-holders as if the call and notice of it had been regular. *Allen v. Bankston*, 33 Ark. 744.

"The object of notice or citation in all legal proceedings is to afford to parties having separate or adverse interests an opportunity to be heard. It is not required for the protection of the applicant or suitor." *Mohr v. Manierre*, 101 U. S. 425-6.

2. The call of 1877 was ineffectual to bar warrants not presented, because it does not appear that notice of the call was given as required by law. The act under which the call was made requires the order to be published in "newspapers printed and published in this state;" and by the provisions of the act of February 15, 1875, regulating the publication of legal advertisements in newspapers, the order must "be published in some daily or weekly newspaper printed in the county: * * * provided, there be any newspaper printed in the county, having a *bona fide* circulation therein, which shall have been regularly published in said county for the period of one month next before the date of the first publication of said advertisement." The act of 1875 further provides that "the affidavit of any editor, publisher, or proprietor, or the principal accountant, of any newspaper authorized by this act to publish legal advertisements, to the effect that a legal advertisement has been published in his paper for the length of time and number of insertions it has been published, with a printed copy of such advertisement appended thereto, subscribed before any officer of this state authorized to administer oaths, shall be the evidence of the publication thereof as therein set forth."

The order was published in two papers published in the county, but the proofs of publication do not state the papers, or either of them, had

a *bona fide* circulation in the county, or that they had been published in the county for the period of one month next before the date of the first publication of the order. Publication of the order in a paper not "authorized," in the language of the act, "to publish legal advertisements," is a nullity; and whether the paper has the circulation, and has been published in the county for the period required by the statute, to authorize the publication of legal notices in its columns, are questions of fact to be proven in the mode provided by the statute for proving the fact of publication. Proof of these facts is a necessary part of the proof of publication, and it must be made by some one of the persons authorized to make the affidavit to the fact of publication.

The persons authorized by the statute to make this affidavit are limited to those whose relation to the paper in which the publication is made is such as to afford them personal knowledge of the facts required to be proven, and the statute in terms declares the affidavits of such persons "shall be the evidence of the publication." That all other methods of proof were intended to be excluded, is shown by the fact that the act repeals all prior acts which authorized other methods of proof. Besides, it is quite obvious that one principal object of the act of 1875 was to secure beyond any contingency the payment of the printer's fee for publishing the advertisement; and this is accomplished by making his affidavit the only legal evidence of the publication, and then providing he shall not be required to make the affidavit until his fee for publishing the advertisement is paid.

It is a rule without qualification or exception, that when it is sought to conclude a party by constructive service, by publication, a strict compliance with the requirements of the statute is required; nothing can be taken by intendment; and every fact necessary to the exercise of jurisdiction based on this mode of service must affirmatively appear in the mode prescribed by the statute. *Gray v. Larrimore*, 4 Sawy. 638, 646; *Steinbach v. Leese*, 27 Cal. 295; *Staples v. Fairchild*, 3 N. Y. 43; *Payne v. Young*, 8 N. Y. 158; *Hill v. Hoover*, 5 Wis. 371; *Galpin v. Page*, 3 Sawy. 93; S. C. 18 Wall. 350; *Settlemier v. Sullivan*, 97 U. S. 444.

It is not competent for this court to receive parol testimony to supply the omission. *Gray v. Larrimore*, *supra*; *Noyes v. Butler*, 6 Barb. 617; *Lawry v. Cady*, 4 Vt. 506.

The record of the county court contains this recital: "From said return [sheriff's] the court doth find that due and sufficient and legal

notice of the calling in of the outstanding warrants of said county has been given."

The return here referred to is spread at large upon the record of the county court in the proceedings under the call, and is made part of it, and discloses on the face of it the defect in the proof of publication which we have pointed out. Where, as in this case, the proceedings are had under special statutory authority, not according to the course of the common law, the recital of due notice must be read in connection with that part of the record which gives the official evidence prescribed by statute. No presumption will be allowed that other or different evidence was produced, and if the evidence in the record will not justify the recital it will be disregarded. *Settemier v. Sullivan*, 97 U. S. 444; *Galpin v. Page*, 18 Wall 350.

MCCRARY, C. J., concurs.

LINTON and Wife v. FIRST NAT. BANK OF KITTANNING and others.

(Circuit Court, W. D. Pennsylvania. March 11, 1882.)

1. NAME—RIGHT TO CHANGE.

At common law a man may lawfully change his name, and he is bound by any contract into which he may enter in his adopted or reputed name, and by his known and recognized name he may sue and be sued.

2. PLEADING—INSUFFICIENT PLEA.

'In a suit by husband and wife, in her behalf, a plea which alleges that the surname in which they sue is not the husband's real name, but which does not deny that it is his known and recognized name, is bad.

3. GUARDIAN—APPOINTMENT—SCOPE OF AUTHORITY UNDER.

An appointment by an orphans' court in Pennsylvania of a guardian for certain designated estates of a non-resident minor, lying within the jurisdiction of the court, does not operate so as to constitute the appointee the general guardian of all the estates of such minor within the commonwealth, but the guardianship is limited to the particular estates mentioned in the petition and order.

4. TRUST DEED—RIGHTS OF BENEFICIARY—MINORITY—EFFECT OF MARRIAGE.

Where B., in consideration of love and affection for his granddaughter, a minor, set apart for her separate use certain bank stock, the trust deed providing that she should not "sell, dispose of, or charge" said stock or its dividends without the consent and concurrence of such guardian or trustee as the proper court might appoint for her, but giving her "the full right to use and enjoy" for her "own use" and that of her family all the dividends, the *cestui que trust* having attained her twentieth birthday, and being then married, held, that she was entitled to receive the dividends directly from the bank without the intervention of either guardian or trustee.

In Equity.

H. & G. C. Burgwin, J. P. Colter, and Geo. W. Guthrie, for complainants.

D. T. Watson, for defendants.

ACHESON, D. J. This is a suit in equity against the First National Bank of Kittanning, Pennsylvania, and James B. Neale. The bill describes the plaintiffs as Adolphus Frederick Linton and Phebe R. E. Elwina Linton, his wife, aliens, subjects of her Britannic Majesty Queen Victoria, domiciled in the kingdom of England. The parents of the wife were John B. Finlay and Jane B., his wife, who was a daughter of James E. Brown, all of whom were resident at Kittanning, Armstrong county, Pennsylvania. Jane B. Finlay died December 30, 1876; James E. Brown died November 27, 1880. The bill alleges that Miss Finlay was born February 18, 1862, and was married December 10, 1878, at the British embassy at Paris, to the plaintiff Adolphus Frederick Linton, a British subject.

On the tenth of August, 1865, the said James E. Brown, in consideration of love and affection for his said daughter and granddaughter, by an instrument of writing gave and assigned to their use 610 shares of the capital stock of said bank, upon the condition that the same should remain in his name and under his control as trustee during his life, for the sole and separate use of his said daughter during her life, "and after her death for the exclusive use of her said daughter, Phebe R. E. Elwina," free from all debts and contracts of their husbands, respectively; neither to sell, dispose of, or charge the said stock, "its accretions and accumulations," without his consent, or that of such guardian or trustee as the proper court should appoint for his said granddaughter after his death: "provided, however, that the said Jane, during her life, and the said Phebe R. E. Elwina, after the death of the said Jane, shall have the full right to use and enjoy for their own use, and that of their respective family or families, all or any part of the accretions or accumulations of said capital stock, and that the receipt of either of said beneficiaries, while being such, shall be a full discharge of myself or guardian or trustee as aforesaid for such accretions or accumulations, in whole or in part, as the same shall be received by them."

It appears that on April 1, 1878, the petition of Miss Finlay, then residing in the state of New York, was presented to the orphans' court of Armstrong county, Pennsylvania, for the appointment of a guardian. That petition (omitting the address and signature) is in these words:

"The petition of Phebe R. E. Elwina Finlay, at present a resident at Clifton Springs, in the county of Ontario and state of New York, represents that your petitioner is a minor child of John B. Finlay, Esq., and of Mrs. Jane B. Finlay, lately deceased; that she is possessed of real and personal estates, in right of her said mother, lying within the jurisdiction of said court, and has no guardian to care for her said estates. She therefore prays the said court to appoint James B. Neale, Esq., a guardian for the purpose aforesaid. The said James B. Neale is neither executor nor administrator of the estate from which my property is derived.

"Clifton Springs, March 29, 1878."

Upon this petition the court made this order, viz.:

"1 April, 1878, presented in open court, and, on due consideration, James B. Neale appointed guardian, as prayed for. Bond in \$40,000; and J. E. Brown approved as surety.

"By the court."

It is shown that after the decease of Jane B. Finlay, and until the death of James E. Brown, the dividends on said stock, by directions of Mr. Brown, were placed upon the books of the bank to the credit of his granddaughter Elwina, both before and after her marriage, and paid out upon her checks or drafts. On February 6, 1879, Mr. Brown wrote in the dividend book, opposite the 610 shares, "Place to the credit of Elwina F. Linton. J. E. Brown;" and in two other instances he made similar entries. But the dividends declared since Mr. Brown's death have not been paid, but are withheld by the bank, the said James B. Neale having notified the bank to pay them to no one but himself; he claiming, under the above appointment, to be the general guardian of Mrs. Linton's entire estate.

The case is now before the court upon three motions: *First*, to strike off a plea filed by James B. Neale as frivolous and immaterial; *second*, for a preliminary injunction to restrain him from collecting or interfering with the dividends declared, or to be declared, upon said stock; *third*, for an order on the bank to pay Mrs. Linton the dividends declared in 1881.

1. The plea alleges that the plaintiff's real surname at the date of the suit was and is Spiller, and not Linton; and that the real name of said Adolphus Frederick Linton, at the time of his marriage to Miss Finlay, was Adolphus Frederick Spiller. The plea is not that the suit is by a fictitious person; nor is any question raised as to the identity of the plaintiffs. Confessedly, they are she who was Miss Finlay, and her husband. Upon the pleadings it is admitted, at least impliedly, that Elwina's husband was married to her under the same name in which he now sues. The suit is in her behalf, and it would

be strange indeed could it be defeated by the suggestion that the surname bestowed upon her in marriage is not her husband's true name. The plea does not deny that Linton was at the time the bill was filed, and is now, the plaintiff's known and recognized surname. If this be so, then it is wholly immaterial that the husband's inherited or original name was Spiller. At the common law a man may lawfully change his name. He is bound by any contract into which he may enter his adopted or reputed name, and by his known and recognized name may sue and be sued. *Doe v. Yates*, 5 Barn. & Ald. 544; *The King v. Inhabitants of Billingshurst*, 3 M. & S. 250; *Petrie v. Woodworth*, 3 Caines, (N. Y.) 219; *In re Snook*, 2 Pittsb. R. 26. The plea, I think, is bad, and must be overruled.

2. Undoubtedly, under the ordinary appointment by the orphans' court, in the exercise of its jurisdiction conferred by the act of March 29, 1832, (Pur. 411, pl. 31,) a guardian is entitled to the custody and care of all the estate, whether lying within the jurisdiction of the court or elsewhere in the commonwealth, to which the ward may then be entitled or may subsequently acquire. The appointment of James B. Neale as guardian of Miss Finlay, however, was not made under that act, but, unmistakably, under the act of April 25, 1850, (Id. pl. 33,) which is as follows:

"The orphans' court of each county in this commonwealth shall have power to appoint guardians of the estates of minors residing out of the commonwealth, in all cases where such minors are possessed of estates lying within the jurisdiction of said court, upon the petition of the minors, or any of their relatives or friends, or any person interested in such estates, without requiring the said minors to appear in court to make choice of such guardians."

Now, it may be that the orphans' court, in a proper case, has authority, under the act of 1850, to appoint a general guardian of the entire estates within the commonwealth of a non-resident minor, including both present and subsequent possessions. But, whether so or not, it is clear to me that the act authorizes a more limited appointment. Be it observed, the appointment may be made upon the petition not only of the minor, or any relative or friend, but of "any person interested in such estates." Thus, the tenant of a particular tract of land belonging to a non-resident minor may petition under this act, but surely the order of appointment would be *quoad hoc*. It would be most unreasonable that upon such petition the court should appoint a general guardian, and it is inconceivable that the legislature intended that all appointments under the act of 1850 should be

unrestricted. True, upon the view now adopted, there might be for the same non-resident minor two or more independent guardians, but each would simply perform the functions of curator of such part of the estate as might be committed to his custody; and herein I perceive nothing incongruous or mischievous. It is not even a novelty, for the same thing occurred anciently in guardianship by socage, where the infant had lands by descent, both *ex parte paterna* and *ex parte materna*. Tyler, *Infancy*, 237.

It seems to me that upon this construction of the act of 1850 the proceedings in the orphans' court of Armstrong county were conducted throughout. The appointment of a general guardian was neither asked nor decreed. With much precision of language the petition sought the appointment of James B. Neale as guardian of the petitioner's estate, of which she was then possessed in right of her deceased mother and lying within the jurisdiction of the court. Here were two express limitations. The orders of the appointment, if of doubtful construction, should be read with reference to the petition. *Graham v. R. Co.* 1 Wall. 704. But, in fact, it is equally definite. It adopted the limitations of the petition. I think it must be held to mean exactly what it says. To extend it by construction would be a dangerous and unwarrantable liberty. It cannot, of course, be maintained that Elwina acquired any interest in this stock or its dividends through her mother. Mrs. Finlay herself had but a life estate, and Elwina takes her grandfather's bounty wholly under the trust deed.

3. While the trust deed provides that Elwina shall not "*sell, dispose of, or charge*" the said "stock, its accretions, and accumulations," without "the consent and concurrence" of such guardian or trustee as the proper court shall appoint for her, it expressly gives her "*the full right to use and enjoy,*" for her "own use" and that of her family, all the said "accretions or accumulations," (*i. e.*, dividends.) Now, although yet in her minority, she has passed her twentieth birthday, and is married. The clear intention apparent upon the face of the trust deed is that she may freely apply the whole income from the stock to the maintenance of herself and the expenses of her household. It is a moderate provision for these purposes, in view of her large estate and station in life. I see, therefore, no good reason why she should not receive these dividends directly from the bank without the intervention of either guardian or trustee. The latter would be a mere conduit. Her right thus to receive the dividends was recognized by all the parties in interest in Mr. Brown's life-time, for by his directions the bank carried the dividends to his granddaugh-

ter's credit, and she checked them out at her own pleasure. It is true, the deed provides that her receipt shall be a discharge of the guardian or trustee, but this does not imply that the dividends shall pass through his hands, but rather the reverse.

The bank has filed an answer expressing its willingness to pay the said dividends to Mrs. Linton if the court shall so direct, and submitting itself to the decrees of the court. The way, therefore, is clear to grant the order asked for, unless it ought to be denied on account of the disclosures which James B. Neale has made to the court. As these disclosures relate largely to matters resting in mere rumor, unsupported by legal evidence, I refrain from the further mention of them in this opinion. I indulge the hope that they have no foundation in truth, and that Mr. Linton may prove to be worthy of his wife's affection and confidence, which it is plain he now possesses. The court is not called upon at this time to deal with the *corpus* of this stock, or make any decree affecting Mrs. Linton's estate generally. These bank dividends should be applied to her comfortable maintenance, in any view of the case. Indeed, if the worst that has been said of her husband be true, this might be but an additional reason why she should have the immediate use and enjoyment of this income which her grandfather's beneficence has provided for her.

The preliminary injunction will be allowed, and it will be ordered that the dividends be paid or transmitted directly to Mrs. Linton. Let orders be drawn in conformity with the views expressed in this opinion.

NOTE. It is not unlawful for persons to be known by any name he or she chooses, or to do business by any name, no fraud being practiced. *Bell v. Sun Printing, etc., Co.* 42 N. Y. Supr. Ct. 567; *Clark v. Clark*, 19 Kan. 522. See *Cooper v. Burr*, 45 Barb. 9; *Eagleston v. Son*, 5 Robt. 640; *Williams v. Bryant*, 5 Mees. & W. 447.

TORRENS v. HAMMOND and another, Trustees, etc.

(*Circuit Court, D. Maryland. March 9, 1882.*)

1. INSOLVENCY—FUNDS IN HANDS OF ASSIGNEES—NOT ATTACHABLE BY FOREIGN CREDITORS.

The funds in the hands of the assignees, appointed by the court as trustees in insolvency proceedings, under state insolvent laws, are not subject to attachment by non-resident creditors of the insolvent.

2. SAME—VALIDITY OF ASSIGNMENT—RULE OF DECISION.

The supreme court of the United States having recognized the validity of assignments under the state insolvent laws to defeat liens attempted to be acquired by non-resident creditors, subsequently attaching; and having decided as to such assignments of property within the state that state insolvency laws are not repugnant to the federal constitution, which prohibits states from passing laws impairing the obligation of contracts,—no reason exists why prior decisions of the supreme court of the state, though long acquiesced in, holding a contrary doctrine, should continue to be the rule of judicial decision.

3. BANKRUPT ACT—EFFECT ON STATE INSOLVENT LAWS.

The adoption of the United States bankrupt act merely suspended the operation of state insolvent laws.

4. STATE INSOLVENT LAWS—AMENDMENT.

Where the operation of the state insolvent laws, which have never been repealed, is revived by a repeal of the United States bankrupt act, a subsequent amendment effected by a repeal of the old law, and at the same instant reenacting it with the amendments incorporated, it cannot be held to prevent the continuous operation of the old law.

Attachment on Judgment.

George E. Nelson, for plaintiff.

M. S. Weil and *Wm. A. Hammond*, for defendants.

MORRIS, D. J. The plaintiff, Torrens, a citizen of New York, sued Gallagher, a citizen of Maryland, in the United States circuit court for Maryland, on a promissory note, dated the seventeenth of January, 1877, and recovered judgment at the November term, 1881.

On July 1, 1881, Gallagher had filed his voluntary petition in the proper state court, making application for the benefit of the insolvent laws of Maryland. On that same day, July 1, 1881, the garnishees in this case, Hammond and Weil, were appointed trustees, and the insolvent, under his own hand and seal, and in the form prescribed by the insolvent laws, conveyed to the trustees, for the benefit of his creditors, all his property, except such as was by law exempted. The trustees took possession of a stock of goods belonging to the insolvent, located in Maryland.

The plaintiff, Torrens, procured an attachment on his judgment

and caused it to be laid in the hands of the trustees on the nineteenth of December, 1881.

When the attachment was laid in their hands, the trustees had, from the proceeds of the sale of the insolvent's stock of goods, an amount sufficient to pay the plaintiff's judgment, but sufficient to pay only a small dividend to the creditors who had filed their claims. The trustees having pleaded *nulla bona*, and shown the above facts in support of their plea, the only question is whether the funds in the hands of an insolvent trustee, under the Maryland insolvent laws, are subject to attachment by a non-resident creditor of the insolvent under the circumstances stated. This question has been several times before the court of appeals of Maryland, and in that court it has been held that under the provisions of the constitution of the United States the state insolvent laws are, as to non-resident creditors, to be treated as nullities, and that when attached by a non-resident creditor the funds in the hands of the insolvent assignee are to be considered as still the money of the insolvent and liable to the attachment. *Evans v. Sprigg*, 2 Md. 457; *Poe v. Duck*, 5 Md. 1; *Glenn v. Glass Co.* 7 Md. 287. This has been so long acquiesced in as settled law in Maryland, that I should not have regarded the question as open for discussion but for the decision of the supreme court in the case of *Kelly v. Crapo*, 16 Wall. 610. This decision is subsequent to the decisions in the court of appeals of Maryland, and they cannot, it seems to me, be reconciled with it.

In the rulings made by the Maryland state courts denying the efficacy of assignments under the state insolvent laws to defeat liens subsequently sought to be acquired by non-resident creditors, their decisions were controlled by the clause in the constitution of the United States prohibiting any state from passing a law impairing the obligation of contracts, and by the construction put upon that clause by the supreme court as then understood. It is not, therefore, a question of the construction of the state statute, but a federal question, which it is the province of the supreme court to conclusively determine.

Until the case of *Crapo v. Kelly*, 16 Wall. 610, there is no decision in the supreme court (except, perhaps, *Bank of Tennessee v. Horn*, 17 How. 157) in which the court was required to pass upon the validity of an assignment in insolvency as against a non-resident creditor subsequently attaching within the state in which the insolvent proceedings were had. Mr. Justice Woodbury, in 1846, in

Manaf'g Co. v. Brown, 2 Woodl. & M. 449, held, at circuit, that even the title of an officer of the insolvent court of Massachusetts, conferred by an order to take possession, where no actual possession had been taken, was sufficient to preserve the property of the insolvent within the state from attachment, after the commencement of the insolvent proceedings by a non-resident creditor.

In Maryland weight has been given to the supposed assent of Chief Justice Taney to a contrary doctrine in his opinion in *White v. Winn*, a report of which is printed in 8 Gill. 499. It is obvious, however, that what is there said by the chief justice on that point is said rather by way of argument and illustration than as statement of the law, and that no such ruling was necessary in the case as he disposed of it. In the case before him the non-resident creditor, having obtained judgment in the United States circuit court, had laid an attachment in the hands of insolvent trustees, who had also previously been trustees under a voluntary conventional deed of trust from the insolvents for the benefit of creditors. The voluntary deed of trust was valid except as forbidden by the insolvent law. The chief justice says, in substance: "Granting that the non-resident creditors may deny the validity of the proceedings under the insolvent law, the voluntary deed of trust will afford a sufficient protection against them. If they insist that the deed is avoided by the provisions of the insolvent law, they must claim under the permanent trustees such interest only as by that law is awarded to them." He gave judgment against the claim of the attaching creditors.

That Chief Justice Taney had no disposition to extend the scope of the decisions which had been arrived at, after so much conflict of opinion, in the supreme court with regard to state insolvent laws, so as to further restrict the effect and operation of such laws, is to be plainly seen in his dissenting opinion in *Cook v. Moffat*, 5 How. 310, in which he states his individual opinion to be that the discharge of the individual should be held valid as to all debts, foreign as well as domestic, in every court within the state in which the discharge is granted.

The supreme court, in *Ogden v. Saunders*, 12 Vt. 358, had decided—

"(1) That the power given to the United States to pass bankrupt laws is not exclusive. (2) That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. (3) But when in the exercise of that power the states pass beyond their own limits and the rights of their own cit-

izens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states, and with the constitution of the United States."

The chief justice gives his assent to the first two propositions, but with regard to the third he says:

"When the two clauses in the constitution referred to in the first two propositions are held to be no restriction, express or implied, upon the power of the state to pass bankrupt laws, I cannot see how such laws can be regarded as a violation of the constitution of the United States, upon the grounds stated in the third proposition. For bankrupt laws, in the nature of things can have no force or operation beyond the limits of the state or nation by which they are passed, except by the comity of other states or nations; and it is difficult, therefore, to perceive how the bankrupt law of a state can be incompatible with the rights of other states, or come into collision with the judicial powers granted to the general government. According to established principles of jurisprudence such laws have always been held valid and binding within the territorial limits of the state by which they are passed, although they may act upon contracts made in another country, or upon the citizens of another nation; and they have never been considered on that account as an infringement upon the rights of other nations or their citizens. But beyond the limits of the state they have no force except such as may be given to them by comity."

Although as to discharges under state insolvent laws the views of Chief Justice Taney were never adopted by the supreme court, and such discharges have never been held valid in any court against non-resident creditors who had not made themselves parties to the proceedings in the insolvent court, yet there certainly has been an increasing disposition to adopt the reasoning of the chief justice, and to refer the inefficacy of the state insolvent laws, as to debts due non-residents contracted after their enactment, to the general want of any extraterritorial force in all bankrupt laws, and not to the prohibition of the constitution of the United States against state laws impairing the obligation of contracts. This appears in the reasoning of Mr. Justice Clifford, in delivering the opinion of the supreme court in *Baldwin v. Hale*, 1 Wall. 223, 234. He says that, since the decision of the case of *Ogden v. Saunders*, whenever the question of the effect of state insolvent discharges has been before that court the answer has uniformly been that the question depended upon citizenship; and in summing up the ground of the judgment he was then announcing he states it to be that the "insolvent laws of one state cannot discharge the contracts of citizens of other states, because

they have no extraterritorial operation." See, also, Story, Conf. Laws, (7th Ed.) § 341a; *Booth v. Clark*, 17 How. 337.

The acceptance of this as the true ground to which the previous decisions of the supreme court upon state insolvent laws are to be referred, prepares us to understand why it was in *Crapo v. Kelly* that the only question seriously litigated was whether or not the ship, which was the property attached by the non-resident creditor, was to be considered at the date of the assignment in insolvency within the territory of the state in which the insolvent proceedings were had. No question of the unconstitutionality of the law was raised or considered. The facts of the case of *Crapo v. Kelly* were, substantially, that the insolvent, a citizen of Massachusetts, being the owner of a vessel then in the Pacific ocean, applied to the insolvent court of Massachusetts for the benefit of the insolvent laws of that state, and the judge of the court, acting under the state statute, executed and delivered to Crapo an assignment of all the property of the insolvent. About two months afterwards, and while the ship was still at sea, a New York creditor of the insolvent entered suit against him in a court of the state of New York, and by reason of the non-residence of the insolvent procured a writ of attachment against his property.

Shortly afterwards the ship arrived at the port of New York, direct from the Pacific ocean, and was seized by the sheriff, by virtue of the writ of attachment. Crapo, the assignee, appeared two days later, and claimed the ship, notwithstanding the attachment. The question thus raised was carried to the highest court of the State of New York, (45 N. Y. 86,) and was there decided in favor of the attaching creditor, that court upholding the right of the New York creditor, and denying the claim of the Massachusetts assignee in insolvency to take the property from the sheriff. This judgment of the New York court of appeals was removed into the supreme court of the United States, upon writ of error, for review; Crapo representing the title under the Massachusetts proceeding in insolvency, and Kelly the claim under the New York attachment. The sole question was which had the better title.

Mr. Justice Hunt, delivering the opinion of the supreme court, said:

"Certain propositions relating to the question are not disputed: (1) If the assignment under which Crapo claims had been the personal act of the insolvent, it would have passed the title to the vessel, wherever she might have been at the time of its execution. (2) If the vessel, at the time of the execution of the assignment, had been within the territorial limits of Massachu-

setts, the assignment, although not the personal act of the insolvent, would have divested his title, and that of all persons claiming under him, provided diligence has been used to reduce the vessel to possession. (3) If the vessel had been in the port of New York at the time of the execution of the insolvent assignment, (there being no personal assignment,) and had subsequently been seized there, under attachment proceedings, by a New York creditor, such attachment proceedings would have held the vessel as against the prior insolvent assignment.

"The first of these propositions results from the facts that personal property, wherever it may be, is under the personal control of its owner, and the title passes by his actual transfer. The second is based upon the idea that the property, being actually present, and under the control of the law, passes by act of the law. The third proposition assumes that a transfer by legal proceedings possesses less solemnity than one by the owner himself; that each nation is entitled to protect its own citizens; and that the remedy by law, taken by its citizens having the actual possession of the *corpus*, ought to prevail over a title by law from another State, which is not accompanied by such possession. This principle authorizes the Massachusetts assignee to hold the property when in Massachusetts, and the New York creditor to seize it when it is in New York, under the circumstances stated. The present case is deficient in each of the elements necessary to bring the vessel within the range of the foregoing principles. She was not transferred by the personal act of the owner. She was not literally within the territory of Massachusetts when the insolvent assignment took effect; and, thirdly, she was not in the port of New York. The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts? If she was, the insolvent title will prevail."

The remainder of the opinion is devoted principally to the discussion of the question of the legal *situs* of the ship at the time of the execution of the assignment by the Massachusetts insolvent court. The conclusion arrived at is thus stated:

"We are of the opinion, for the purpose we are considering, that the ship was a portion of the territory of Massachusetts, and the assignment by the insolvent court of that state passed the title to her in the same manner and to the like effect as if she had been physically within the bounds of that state when the assignment was executed. * * * If the title passed to the insolvent assignees it passed *eo instanti* the assignment was executed. It took effect then, or never. The return of the vessel to America, her arrival in the port of New York, her seizure and sale there, did not operate to divest a title already complete."

Mr. Justice Clifford concurred in the judgment of the court, but did not assent to the ground on which the judgment was based in the opinion from which the foregoing quotations are taken. It was his opinion that the ship was a vessel of the United States, and not of Massachusetts; and that when, by the law of nations, vessels were said to remain

a portion of the territory of the state of which the owner was a citizen, the nation was meant, and not any subdivision of it. He concurred, however, in the judgment of the supreme court, and the reversal of the court of appeals of New York, upon the ground that, as the owner of a ship at sea can sell and make a valid transfer of title to her without delivery, delivery being impossible, and that as the deed executed by the judge of the insolvent court was intended to assign and convey all the property of the insolvent as fully as he himself could have done, that the effect of the assignment was to vest in the assignee an absolute and perfected title to the ship, which the subsequent attachment upon her arrival in New York could not divest.

Two of the justices of the supreme court dissented from the judgment of the court, but not upon grounds which at all weakened the decision in its application to the case now before me. They held that the fiction with regard to the *situs* of the ship, by which, although upon the high seas, she might be considered as still part of the territory and within the jurisdiction of Massachusetts, was but a fiction of law, and such as had never been allowed when its effect would be to give extraterritorial force to insolvent laws; that insolvent laws having no extraterritorial force except by comity, such comity was never exercised to the prejudice of the citizens of the state which accorded it. Mr. Justice Bradley, who delivered the dissenting opinion, said:

"I do not deny that if the property had been within Massachusetts jurisdiction when the assignment passed, the property would have been *ipso facto* transferred to the assignee by the laws of Massachusetts *proprio vigore*, and, being actually transferred and vested, would have been respected the world over."

The report of *Crapo v. Kelly* shows that neither by the eminent counsel who argued the case, nor by any of the learned justices who expressed their views upon it, was it ever questioned that if the chattel which was the subject of the attachment had been at the date of the assignment within the state of Massachusetts, the title would have passed to the insolvent assignee so that no subsequent attachment could have prevailed against it.

The contrary decisions in the court of appeals of Maryland were the result of the construction of the federal constitution which prevailed in that court when those decisions were made, and when it appeared that the *lex rei sitæ* must yield to its prohibition; but the supreme court having differently interpreted the constitution, there would seem no reason why those rulings should continue to be the

law of Maryland. Certainly it is more consonant with equity that the insolvent assignee should not collect the assets of the insolvent merely to have them wrested from him by the non-resident creditor, and that the domestic creditor should not be compelled to submit to have his claim discharged while another seizes the entire fund which was the consideration of his giving it up.

The only other point made before me on behalf of the attaching creditor was that the state law was passed subsequent to the date of the contract on which the judgment was recovered, and therefore as to him a nullity. How this might affect the case, if true, it is not necessary to decide, as I do not find it to be the fact.

The legislature of 1880 did materially amend some provisions of the state insolvent law, but the act of that session was, so far as the insolvent proceedings produced in this case are concerned, an amendment merely. The state insolvent laws, although suspended during the period the United States bankrupt acts were in force, have been upon the statute book at least since 1854. The form in which, for convenience in codifying, amendments are usually framed by the legislature of Maryland,—that is, by repealing the old law and at the same instant re-enacting it with the amendment incorporated,—has never been held to prevent the continuous operation of the old law. *Dashiell v. City of Baltimore*, 45 Md. 624. As to voluntary petitions in insolvency,—and the proceedings produced in evidence in this case are of that class,—the old law has remained substantially unchanged by the act of 1880.

Judgment for the garnishees.

LINDSAY v. STEIN.*

(Circuit Court, S. D. New York. February 24, 1882.)

1. LETTERS PATENT—IMPROVEMENT IN SLEEVE SUPPORTERS.

The invention described in letters patent No. 202,735, granted to J. P. Lindsay, April 23, 1878, for an "improvement in sleeve supporters," which consists of a clasp at each end of a connecting web or strap, is not merely a new application of the invention described in letters patent No. 156,429, granted to said Lindsay, November 3, 1874, for "stocking supporters." It is an article complete in itself, and involved invention.

*Reported by S. Nelson White, Esq., of the New York bar.

2. SAME—ABANDONMENT UNDER SECTION 4894, REV. ST.

Section 4894, Rev. St., which provides that upon failure to prosecute an application within two years after action is had thereon by the patent-office, it shall be regarded as abandoned, refers to the application, not the invention, and does not prevent a subsequent application for the same invention.

3. SAME—SAME—DEFENCES.

Such subsequent application can derive no aid as to time from the prior abandoned application. The applicant must stand, as to defences in suits on the patent, as if the new application were the first application.

4. SAME—PATENTABILITY—RECOGNITION BY PUBLIC.

Where an article is of great utility, has superseded older articles, and is largely recognized by the public and licensees as a useful invention, there is a strong presumption in favor of its patentability.

In Equity.

Munson & Phillips, for plaintiff.

J. B. Staples, for defendant.

BLATCHFORD, C. J. This suit is brought on letters patent No. 202,735, granted to the plaintiff April 23, 1878, for an "improvement in sleeve supporters." Some time in 1873 the plaintiff invented a clasp. He applied for a patent for it on the thirty-first of August, 1874, and obtained a patent for it, (No. 156,429,) November 3, 1874. The specification of that patent speaks of the clasp as one "for stocking supporters or various other articles of wearing apparel." The clasp is composed of two jawed levers, pivoted together, and a spring arranged between them. The tail of each jaw-lever is made concavo-convex in transverse section, the lower lever, with its jaw, being extended within the upper lever and its jaw. At the place of connection of the two levers the lower one is punched inward on its flanks, so as to form two concavo-convex teats or projections. The spring is shaped or made of wire, and has an eye which is slipped upon the two teats, after which the upper jaw-lever is arranged with respect to the spring and the lower jaw-lever in proper position, and then is punched inward on its flanks, so as to enter the two teats, and thus the two levers are connected and pivoted together.

The levers cover and protect the spring, and, as the specification says, prevent it "from being caught in the stocking or clothing," and from moving laterally or getting out of place. The specification says that each of the jaws may be notched or provided with teeth in its opposite edges, and that by having the jaws of the lower lever close into the concavity of the jaw of the upper lever a much better hold of the "material or stocking" will be secured than when the jaws abut together at their edges. The tail of the upper lever has a slot-

ted head, which is projected from the tail in such manner that its flanks, in case the clasp is pressed "against the leg of the wearer," may bring up against it "in a manner to prevent" the tail of the lower jaw from being accidentally moved inward, so as to open the jaws sufficiently to cause them to let go their hold "on the stocking;" and "the slotted head is also to enable the clasp to be attached to a strap of a stocking supporter." The claim of No. 156,429, is this: "The clasp composed of the levers provided with the operative spring, pivoted together by means of the indentations, as described, and made with concavo-convex jaws and tails, and with the one jaw to close within the concavity of the other, all substantially as specified."

In January or February, 1874, the plaintiff invented the sleeve supporter afterwards patented by No. 202,735. It consisted of two of the clasps described in No. 156,429, one being at each end of a connection either elastic or non-elastic. No. 202,735 describes the supporter as one "for the sleeves of shirts and other garments." It is applied to the sleeve in a direction longitudinal with the arm, "thereby avoiding the compression and consequent interference with the free circulation of the blood incident to that class of supporters which partially or entirely encircle the arm." One clasp grasps a fold of the lower part of the sleeve to be supported, while the other clasp grasps a fold of the upper or supporting portion of the sleeve; the lower portion of the sleeve being drawn up to the desired distance before attaching the second clasp, the intermediate portion between the two clasps being drawn up into folds by that operation. The specification disclaims "a garment supporter consisting of an elastic strap and two tongued plates attached to its ends, the tongues being made to enter holes in the garments, and being afterwards clinched down thereon." It also says:

"My improved supporter simply grasps the sleeve, and does not go into or through it, and consequently, in detaching the supporter therefrom, it does not require to be pulled lengthwise, and thereby cause undue strain, which tends to tear the sleeve. Nor does my supporter require cuts or holes to be made in the sleeve to receive it, as is usually the case with garment supporters."

The claims of No. 202,735 are two, as follows:

"(1) The improved method of supporting or shortening the sleeves of shirts and other garments without compression, to avoid interference of the free circulation of the blood of the wearer incidental to the use of encircling bands by means of a holder, consisting, essentially, of a short piece of elastic

or non-elastic webbing, provided at each end, and an automatic clasp device applied to the sleeve in the direction of its length, substantially as described and shown. (2) As a new article of manufacture a sleeve supporter, consisting of the strap, B, provided at its ends with the clamping jaws, A A, all combined and adapted for use substantially as described."

The plaintiff, after making one of these supporters in January or February, 1874, showed it to other persons and illustrated its use at that time, and used it himself satisfactorily in March or April, 1874. He made a second supporter of the same structure in September, 1874, as a model for an application for a patent. His application was filed in the patent-office, complete, October 28, 1874. The specification was sworn to October 20, 1874. The drawings were substantially the same as those in No. 202,735, and the description was to the same effect. The claim was substantially like claim 2 of No. 202,735. The spring closes the jaws, and they are opened by pushing the tails of the jaws towards each other against the action of the spring, the tail of the lower jaw projecting downward. This application was rejected November 9, 1874, on the ground that it did not involve invention, in view of No. 156,429, and of a patent to Langford and one to Boughton. On December 26, 1874, amendments were filed—one, to obviate the Boughton patent, disclaimed a supporter consisting of an elastic strap and two hooked plates fixed to its ends, the hooks "being to enter a garment;" another disclaimed either of the clasps separate from the strap. The amendments were considered, and on January 2, 1875, the application was again rejected, in view of the same references. Nothing more was done till April, 1878.

On the ninth of April, 1878, a new application was filed, complete, with a new petition, oath, specification, drawing, and model, and a new fee. The oath was made April 5, 1878. On the eleventh of April, 1878, the application was rejected as being "found to be lacking in patentable novelty, in view of the state of the art," because the clasp was old, as seen in No. 156,429, and because "suspending straps, composed of an elastic band, with a clasp, buckle, or other adjusting device on each end, are also old, and therefore, in the present instance, the alleged invention is but the mere substitution of one old clasp in the place of another upon the ends of the strap, and is not deemed an invention." Reference was made, in the letter of rejection, to patent No. 88,984, to Robbins, and to patents to Gibbons, Church, and Eames, and Philbrook. On the eleventh of April, 1878, after said rejection, amendments were made making the specification and claims exactly as they are in No. 202,735. The application was rejected

again on the thirteenth of April, 1878, on the same references, and on a patent to Sanford, but on the same day the patent was ordered to be issued.

It is contended for the defendant that No. 156,429 contains everything that is found in No. 202,735; that there is no invention involved in passing from the clasp to the structure with one of the clasps at each end of it; and that the case is one of mere duplication or double use, or, at least, of merely a new application of the clasp. It is quite apparent, from the evidence, that the clasp was applicable, and was applied for use by being attached to one end of a piece of elastic and then fastened to a stocking to hold it up, the other end of the elastic being fastened by a button or other device to another garment above. Large numbers of the clasps were made and sold and used in that way. The plaintiff, almost simultaneously with his invention of the clasp, capable of such separate use, invented the supporter, consisting of the two clasps and the connecting strap. The latter invention was completed before he applied for a patent for the former. In that application he might have covered the supporter and also claimed the clasp separately, and one patent might have embraced both. The supporter is not merely a new application of the clasp. It is something more. As a structure, the two clasps with the uniting strap will do what one clasp, or one clasp with an attached webbing, cannot do. It is an article complete in itself, capable of use at any place without any appliance except what it contains, and of being moved from one place to another, without any previous special preparation of the garment to receive it. It involved invention beyond what the clasp alone indicated.

The specification of No. 202,735 is criticised as being obscure and as not pointing out what invention is claimed. The first claim is properly to be construed as a claim to using the structure described, consisting of material with the clasp described, or its substantial equivalent, at each end, when such structure is applied to the sleeve in the direction of its length. There is no valid objection to this claim. The article can be used otherwise than lengthwise of the sleeve. The second claim is for the article, irrespective of the manner in which it is used. The first claim may be unnecessary, and there may be little practical difference between the two claims. But the claims sufficiently point out the inventions, and they are patentable.

By section 12 of the act of March 2, 1861, (12 St. at Large, 248,) it was enacted as follows:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the petition, and in default thereof, they shall be regarded as abandoned by the parties thereto, unless it be shown, to the satisfaction of the commissioner of patents, that such delay was unav avoidable."

By section 32 of the act of July 8, 1870, (16 St. at Large, 202,) it was enacted as follows:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the petition, and in default thereof' or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown, to the satisfaction of the commissioner, that such delay was unavoidable."

This section is substantially re-enacted in section 4894 of the Revised Statutes, approved June 22, 1874, the only change being that the words "the filing of the petition," in section 32, are altered to the words "the filing of the application," in section 4894. On comparing section 32 of the act of 1870 with section 12 of the act of 1861, it is seen that a material change was made by the addition, in section 32, of the words "or upon failure of the applicant to prosecute the same within two years after any action therein." The effect of the addition was that when an applicant for a patent should make an application, and complete it for examination, and the patent-office should take action upon it and reject it, and notify him of such action, and he should fail to prosecute it within two years after such rejection, it should be regarded as abandoned, so that it could not be resumed and prosecuted further after the lapse of such two years, unless it should be shown, to the satisfaction of the commissioner of patents, that such delay was unavoidable. It is not the invention which should be regarded as abandoned, but the application.

In the present case the application of October 28, 1874, was rejected a second time January 2, 1875. That application was never prosecuted at all after that. More than two years elapsed, and in December, 1877, the plaintiff employed new attorneys, and gave them a power of attorney, and revoked the power of attorney given to his former attorney. A paper to that effect was filed in the patent-office, December 17, 1877, in the files of the first application. The new attorneys, with the whole matter before them, advised the plaintiff that he had better make a new application. They did this, unquestionably, because they saw that they could not show to the

satisfaction of the commissioner that the delay beyond two years from January 2, 1875, was unavoidable. The new application was made complete April 9, 1878.

The defendant contends that the effect of the act of 1870 is that when an application is, under section 32, to be regarded as abandoned, no new application for a patent for the same thing can be subsequently made. There is nothing to prevent a subsequent application. When made it can derive no aid, as to time, from the prior abandoned application, and the applicant must stand, as to defences in suits on the patent, as if the new application were the first application. Therefore, as applied to the present case, the words "two years prior to his application," in section 4886 of the Revised Statutes, and the words "two years before his application for a patent," in section 4920, must mean two years before April 9, 1878, so that No. 202,735 will be invalid if the inventions covered by it were in public use or on sale in the country for more than two years before April 9, 1878. The decisions of the courts under the statutory provisions before that in section 32 of the act of 1870, in regard to the continuity of an application once made, can have no application to a cause like the present, in view of the express provision of section 32. An application which is to be "regarded as abandoned" must be regarded as abandoned by the commissioner and the courts, and, if it is to be regarded as abandoned, it cannot be regarded as subsisting for the purposes of sections 4886 and 4920. The cases of *Singer v. Braunsdorf*, 7 Blatchf. C. C. 521; *Blandy v. Griffith*, 3 Fish. Pat. Cas. 609; *Howes v. McNeal*, 15 Blatchf. C. C. 103; *Godfrey v. Eames*, 1 Wall. 317; and *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, arose under statutory provisions enacted before the act of 1870, and can have no application to the present case.

It is argued for the plaintiff that as No. 202,735 was granted on the second application for the same invention that was claimed in the first application, it must be presumed that the commissioner had before him evidence showing that the delay in prosecuting the first application was unavoidable. This would be so if in fact the commissioner had allowed the first application to be prosecuted further. But he did not. It was the application of April 9, 1878, that was rejected April 11, 1878, and granted April 13, 1878, and No. 202,735 was issued on that application, as appears on its face and by the records of the patent-office.

The defences of want of novelty and of public use and sale of the invention for more than two years before the application for the patent are urged by the defendant. The latter defence is not set up in the answer, but the plaintiff appears desirous of having it considered under the proofs.

There is no satisfactory evidence that the plaintiff, either by himself or by his agents, allowed his sleeve supporter to be in public use or on sale at any time prior to two years before April 9, 1878; or that a structure substantially like his was in public use or sale at any time prior to two years before April 9, 1878. The date of any sale by Taylor Brothers cannot be fixed earlier than January, 1877. There was no sale by Shelby before the last part of 1876. The Thomas transaction was in May, 1876. The evidence as to sales by Rollins does not show, beyond a reasonable doubt, that such sales were made before April 10, 1876.

Defendant's exhibits 1 and 2 are arranged to penetrate or pass through at one end one portion of the article to be supported, while at the other end are loops or hooks to pass over or around buttons or some other previously-arranged attaching means formed upon the garment. Defendant's exhibits Nos. 3 and 16 have no hinged jaws, and require a further shortening of the garment to allow of attaching or disengaging the wires, and the device is liable to lose its hold and cannot seize the margin of a garment. Defendant's exhibit No. 21 is the patent to Robbins, No. 88,984, and defendant's exhibit No. 5 is a garter made according to that patent, in part. They show devices the structure of which is such as to necessitate the penetration of the garment at each end of the webbing by the devices. The Robbins patent is the only one of the prior patents referred to by the patent-office (except No. 156,429) which has been put in evidence by the defendant. It shows two like devices at each end of a piece of webbing. It is of the date of 1869. But the existence in it of identity between the fastening devices at each end of it does not, in view of the evidence as to the invention by the plaintiff of the clasp and of the supporter, and of the characteristic features of the supporter, show a want of patentability in the invention of the supporter.

The Ellis patent, No. 137,539, requires a button at one end of the device. The Cook patent, No. 55,064, has no clamping jaws, and no webbing with holding means at each end of it. The Kendall or Vail patent, No. 61,011, has no clamping jaws on each end of a strap of webbing. Defendant's exhibit No. 22, the Demorest book, is not

proved as to its date of publication, and is not set up in the answer. Independently of this, it is not clear what the thing shown in it is, or how such thing is to be used. From what can be made out it is liable to the same objections as defendant's exhibit 3, requiring the fabric to be forced into a narrow opening, and requiring increased shortening to free the fabric, and having no clamping jaws. As to the exhibits, Furness and Furness No. 3, no original article actually made more than two years before April 9, 1878, is produced. The question as to the time when any sleeve supporters of the kind were made and sold rests wholly on the unaided memory of Mr. Furness, and, in view of all the evidence, it must be held that the defence as to the Furness sleeve supporter is not established. Irrespective of this, it is not at all clear that the Furness exhibits embrace the plaintiff's invention, or will practically accomplish the results which the plaintiff's supporter will accomplish. None of the prior articles or patents anticipate the invention of the plaintiff, and none of the defences considered are established.

It appears that the patented article is one of great utility, and has found a ready market, as compared with any prior structures. Under the plaintiff's authority, from 850,000 to 1,150,000 pairs of his supporters have been sold during 1878, 1879, and 1880, and there have been infringements. The article combines these points of advantage: It does not compress the arm; it does not require adjustment of length for arms of different sizes; it does not require previous preparation of the garment by putting on buttons or making eyelet holes at either end; it can be used to support cuffs and stiff articles on their edges; it can be applied by one hand; it is secured without perforating the garment; it is not pulled off by a slight strain; it does not require to be pulled lengthwise to release its hold. It has superseded older articles, and is largely recognized by the public and licensees as a useful invention. All these matters are very persuasive in favor of its patentability. *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 495.

The defendant has sold two structures, No. 1 and No. 2. No. 2 is identical with the plaintiff's in all substantial particulars. It is a sleeve supporter formed of a short piece of elastic webbing, with a clasp at each end. Each clasp is composed of two jawed levers pivoted together, with a spring between them which closes the jaws automatically, and the jaws are opened by pressing together the tails of the levers. Each jaw has across its end teeth or projections, which take into corresponding indentations in the end of the other

jaw. This construction is an equivalent construction for the closing of the lower jaw within the upper jaw, as shown in No. 156,429, and in the drawings of No. 202,735. The bending of the fabric, in the one case transversely and in the other case longitudinally, assists in holding it, though it by no means follows that No. 202,735 would not be infringed if the clasps had flush-meeting edges in the jaws, with a spring, or means of holding them together, sufficiently powerful. No. 1 is a sleeve supporter having at each end of a piece of elastic webbing a clasp made of two jaws of springy metal, the end of each of which is a lip projecting towards the other jaw, one lip shutting inside of the other and the ends of the lips not meeting. There is a slide enclosing the shank of the two jaws, and the bite is made by sliding the slide towards the lips, which forces the lips together. Sliding the slide in the reverse direction allows the jaws to open, which they do by their springy action, they being set to stand open unless made to shut. They shut against the action of the spring, while in the plaintiff's form the clasp opens against the action of the spring.

The form of clasp in No. 1 is substantially the clasp shown in the Ellis patent, No. 137,539, granted April 8, 1873. But that patent shows that Ellis contemplated the use of only one clasp, and that at the top of a stocking, while above the supporter was to be attached by a button to a waistband. No. 1 has all the points of advantage of the plaintiff's structure. It has an automatic clasping device at each end, consisting of clamping jaws, and the structure as a whole, and in its parts, and in their co-operation to effect the result produced by the whole, is the equivalent of the plaintiff's structure. The change in the springy action, to hold open instead of to hold shut, is immaterial in regard to the action of the structure as a whole. There was nothing in the Ellis clasp by itself to indicate the plaintiff's supporter or No. 1, any more than there was anything in the plaintiff's clasp by itself to indicate the plaintiff's supporter or No. 2. On the foregoing considerations it must be held that both No. 1 and No. 2 infringe the second claim of No. 202,735, and there must be a decree to that effect, and for an account of profits and damages, with a perpetual injunction, and costs to the plaintiff.

RYAN v. LEE.*

(Circuit Court, E. D. Missouri. March 22, 1882.)

1. CIRCUIT COURT—JURISDICTION—PATENTS—ASSIGNMENTS—REV. ST. §§ 629, 4898.

Where A. brought a suit in equity in a circuit court of the United States, and alleged in his bill that he had recovered a judgment against B., the defendant, in a state court for \$52; that an execution had been issued; that the judgment remained unsatisfied; that B. had no property in the state subject to execution, but was the owner of certain letters patent issued to him by the government of the United States, and prayed the court to order B.'s interest in the patented invention sold, and the proceeds applied to the payment of said judgment,—*held*, that the case was not a suit "arising under the patent laws," within the meaning of section 629 of the Rev. St., and that the court had no jurisdiction.

In Equity.

The complainant alleged in his bill that he had recovered a judgment against the defendant, in a suit before a justice of the peace of the city of St. Louis, for the sum of \$52 and costs; that execution had been issued, but that no property had been found subject thereto; that it was wholly fruitless; that the defendant owned no property subject to execution issued by any court of the state of Missouri; that said judgment and costs remained wholly unpaid, and that nothing could be recovered thereon through the ordinary processes of law; that the defendant was the inventor of a certain machine, for which he had obtained letters patent from the government of the United States, which he still owned. The bill closed with a prayer that the court might grant an order directing that all the interest of the defendant in and to said letters patent might be sold, and that the proceeds of the sale be applied towards the payment of said judgment and the costs of this suit; that the defendant be ordered to make an assignment in writing of his interest in said invention to the purchaser at such sale, and that in case he refused to comply with the order of the court a trustee might be appointed with full power for, and instead of, the defendant, to make an assignment to the purchaser at such sale; and that a preliminary injunction might be granted to restrain the defendant from disposing of said patent during the pendency of the suit. Shortly after the filing of the bill the complainant moved the court to grant his prayer for a preliminary injunction. It was contended in his behalf that the court had jurisdiction of the suit under sections 629 and 4898, Rev. St., which

*Reported by B. F. Rex, Esq., of the St. Louis bar.

respectively provide that circuit courts shall have original jurisdiction "of all suits at law or in equity arising under the patent or copyright laws of the United States," and that every patent or any interest therein shall be assigned in law by an instrument in writing; and the patentee or his assignee, or legal representatives, may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States, etc.

Paul Bakewell, for complainant.

TREAT, D. J., (*orally*.) The parties to this suit are both citizens of the state of Missouri, and the amount of the demand is too small to bring the case within the jurisdiction of this court, even if they were citizens of different states. The mere fact that it is sought to acquire an interest in a patent by legal process, does not make the case one of a suit on a patent, so as to bring it under the provisions.

NOTE.

The incorporeal right secured to an inventor or author by letters patent or a copyright, issued by the government of the United States, cannot be seized or sold under an execution. *Murray v. Ager*, (S. C. D. C. Jan. 1881,) 20 O. G. 1310; *Stevens v. Gladding*, 17 How. 450; *Stephens v. Cady*, 14 How. 528. Nor will the sale under execution of an instrument or machine, owned by the owner of a copyright or patent, transfer to the purchaser any right to use it in printing or manufacturing the thing copyrighted or patented. *Stevens v. Gladding* and *Stephens v. Cady*, *supra*. But a sale under an execution of a patented machine will transfer the right to use it. *Woodsworth v. Curtis*, 2 Wood & M. 530. And a patent or copyright will pass as assets to the owner's assignee in bankruptcy. *Hesse v. Stevenson*, 3 Bos. & Pul. 565; *Nias v. Adamson*, 3 B. & Ald. 225; *Coles v. Barrow*, 4 Taunt. 754.

As is above stated, neither a patent nor a copyright is the subject of seizure or sale by execution; but where the owner has no property subject to execution, a court of equity may compel a sale and assignment of a patent or copyright for the benefit of a judgment creditor. It may order a sale, and direct the debtor to assign his interest in the patent or copyright to the purchaser, and, in case of his refusal to do so, may appoint a trustee with authority to execute the assignment, (*Stephens v. Cady* and *Murray v. Ager*, *supra*;) or, where a receiver of the debtor's property has been appointed, it may compel an assignment to him, and order him to make the sale. *Pacific Bank v. Robinson*, (S. C. Cal.) 20 O. G. 1314; *Barnes v. Morgan*, 3 Hun. (N. Y.) 703; *Barnes v. Morgan*, 6 Thomp. & C. (N. Y.) 105. Suits to compel the sale and assignment of patents or copyrights are not suits "arising under the patent or copyright laws of the United States," and state courts of equity have jurisdiction of them. *Pacific Bank v. Robinson*, *supra*.

B. F. REX.

MACDONALD *v.* SHEPARD.*(Circuit Court, D. Massachusetts. January 17, 1882.)*

1. LETTERS PATENT—MASTER'S FEES—PRACTICE.

The prevailing practice in the district of Massachusetts, in cases of accounting upon adjudged infringements of patents, is to charge the master's compensation on the plaintiffs in the first instance, to be recovered in costs if the final decree is for the complainant.

LOWELL, C. J. Upon the application of the master in this cause for an allowance of \$850 as compensation for his services and disbursements, and a direction by the court as to the party upon whom the same shall be charged and by whom borne, and the parties having been heard thereon and agreeing that the amount asked for by the master is reasonable, the same is allowed; and it appearing to the court that the prevailing practice in this district in cases of accounting upon adjudged infringements of patents is that the master's compensation is charged upon and borne by the complainants in the first instance, and recovered in costs if the final decree is for the complainants; and no sufficient cause being shown for varying such practice in this case, it is ordered that the master's compensation in this case be charged upon and borne by the complainant.

THE TWO MARYS.

(District Court, S. D. New York. March 6, 1882.)

1. ADMIRALTY—LIEN OF SHIPWRIGHT FOR REPAIRS.

A shipwright has a common-law lien for the amount of his repairs upon a vessel taken to his yard and put upon the ways for such purpose, though the mate in the employ of the owner remain about her and sleep aboard.

2. SAME—REPAIRS—LIABILITY OF PART OWNER.

Such a lien, without regard to the absolute necessity of the repairs, is legal to the extent of the interests of the part owners of the vessel in possession who directed such repairs to be made, though not binding upon a part owner who gives express notice of his dissent to the repairs.

3. SAME—RIGHT OF POSSESSION.

The shipwright in such a case has the same common-law right to maintain his possession that the part owners had who employed him.

4. RIGHTS OF PART OWNERS DISSENTING.

If the repairs be necessary, whether the share of the part owner who expressly dissents be bound or not, he cannot derive any benefit from the subsequent use of the vessel without allowance for the repairs.

5. COMMON-LAW LIEN PROTECTED.

The common-law lien of a shipwright in possession is recognized and protected in admiralty where the vessel is seized under process of the court in other proceedings.

6. CASE STATED.

Where H., a shipwright, made repairs upon a vessel in his yard beyond what was necessary, and enlarged her at the request of the owners of seven-eighths, but with notice of dissent from the other part owner; launched her in course of the work; retained her in the stream adjacent to his yard; worked upon her daily until three days prior to the time when she was seized by the marshal under process of this court upon a libel by another for supplies, and the vessel was still unfinished in her forecastle and her center-board not being in, but in the shipwright's yard; and the mate in the employ of the owner had continued on the vessel from the time she was taken for repairs to the ship-yard until she was seized by the marshal, sleeping on board; and the captain with his son, after she was launched, having been more or less aboard with the shipwright's assent, though forbidden to interfere; and the marshal, upon coming to arrest the vessel, being forbidden by H. on the ground that she was in his possession: *Held*, that the presence of the mate, and also of the captain upon sufferance, were not sufficient evidence of any surrender of the vessel by H.; that the vessel continued in his possession in the stream, as upon shore, at the time when she was seized by the marshal; and that H. was therefore entitled to intervene as a claimant for the protection of his interest as against the shares of those who employed him.

Hearing on Exceptions to Intervenor's Claim.

H. B. Kinghorn and *R. D. Benedict*, for libellant.

Scudder & Carter and *G. A. Black*, for Hawkins, lienor.

BROWN, D. J. This hearing arises upon the report of the clerk, to whom it was referred on December 23, 1879, to take such testimony as might be offered concerning the interest of John P. Hawkins in the schooner *Two Marys*, and his right to appear as claimant. The claim of Hawkins was filed September 22, 1879, and averred that he was in possession of the schooner at the time she was seized by the marshal on September 17th; that he had been repairing and reconstructing her; that his work was not completed, and the sum of \$5,000 was due him. Libellant filed exceptive allegations to this claim, averring that Hawkins had no lien, was not in possession, had surrendered and abandoned her, that nothing was owing him, and that he had no interest in the vessel.

At the time of seizure, Hawkins, and Crowley, the master, each claim to have been in possession. On the twenty-second of September, Hawkins, as claimant, gave a bond for libellant's claim under the act of 1847, and the usual order for the release of the vessel was given on that day, and Hawkins received from the marshal a notice to the keeper for the discharge of the vessel. On going aboard he found Crowley already there. A controversy arose, the result of

which was that Hawkins was taken away under arrest by a police officer. The keeper of the marshal left the vessel with Crowley aboard.

Upon a subsequent hearing before this court the marshal was ordered to retake possession, on the ground that the process had not been properly executed, (see 10 Ben.) and a reference was ordered to inquire into Hawkins' interest as above stated. Subsequently, on February 12, 1880, Crowley, who was the owner of one-sixteenth and intervened as claimant, gave a bond in the sum of \$7,000 to Hawkins for the safe return of the vessel, and was allowed by the court thereupon to receive possession from the marshal. Before the present hearing Crowley died, and subsequent proceedings were had, upon notice to his administratrix and the stipulators on his bond.

The libel was filed on the twenty-fifth of January, 1879, for supplies and materials furnished to the schooner in this, her home port. She was at that time in the ship-yard of Hawkins, undergoing repairs. The process was served upon the vessel and upon Hawkins, but possession was not taken by the marshal. The libellant was at that time owner of five-sixteenths, and the object of filing the libel was shown to be to facilitate his acquiring the interests of the other owners who had dissented to the repairs which the libellant had ordered to be made, and which were then going on in Hawkins' ship-yard; while Crowley, the owner of one-sixteenth, was acting in concert with the libellant. Shortly after the libel was filed, the libellant obtained a transfer of the interests of all the other owners for a small sum, except that of one Wheaton, of Philadelphia, the owner of one-sixteenth, who had also protested against the repairs, and who has not intervened in this suit. Hawkins was notified of the intention of McLean to file a libel, and of his purpose in doing so,—to facilitate the completion of the repairs and of rebuilding, as desired. The work was substantially proceeded with by Hawkins, at the libellant's request, and the vessel launched on August 27th. Her seizure by the marshal on the sixteenth of September was made without prior notice to Hawkins, while some work still remained to be done upon her, and seems to have been designed as a means of cutting off any claim of Hawkins to the possession of her. There was no other person asserting any opposing claim. It is upwards of three years since the action was commenced, and there is no other controversy than that with Hawkins.

The reference and the testimony on it involve substantially all the merits upon Hawkins' side of the case, and a large mass of testimony

has been taken. On behalf of the libellant it is claimed (1) that Hawkins never had any lien upon the vessel; (2) that if he ever had such a lien it was lost by surrendering the vessel before the seizure by the marshal on the sixteenth of September.

1. The lien claimed is simply that of a common-law possessory lien by Hawkins, the shipwright, for repairs while in his possession. The libellant contends that he never acquired any common-law lien, for the reason that he was notified by several of the owners, before proceeding with the work, that they protested against the proposed repairs; that, consequently, neither such owners nor their property could be made liable for repairs made against their consent; that no lien could, therefore, bind their interest in the schooner; that there could be no common-law lien upon the interests of part owners only; and that under such circumstances the repairs must be presumed to have been made upon the personal credit of those who ordered them. It is also contended that Hawkins never had such exclusive possession as would sustain a common-law lien.

The vessel was sent by the libellant, about December 1, 1878, to Hawkins' ship-yard at City Island to be repaired, with directions to make first a preliminary examination to ascertain how much repair was necessary. The schooner was hauled on the ways and found to be in need of greater repairs than were anticipated. In February, 1879, after the libellant had acquired almost the entire interest in the vessel, it was determined to substantially rebuild her. Captain Crowley accompanied the vessel to the yard, and remained with her a few days. The mate, Lawrence, in the employ of the libellant, remained with her while the repairs were going on, down to the time of her seizure by the marshal. He slept in the cabin until it was removed in the course of the repairs, and then continued to sleep in it, near by, until he was again put aboard the vessel. His meals were furnished by the libellant. He did such work as was assigned to him by Hawkins upon the schooner, as well as some odd jobs upon other vessels. The work of doing the repairs and rebuilding was under the exclusive management and control of Hawkins. While this was going on, the vessel, in my judgment, must be deemed to have been in the possession of Hawkins sufficient to sustain a common-law possessory lien. The presence of the mate during these repairs, in the pay of the libellant, whether as seaman or assistant, or for any other purpose, in looking after the interest of the libellant, was in no way incompatible with Hawkins' control of the work upon the vessel while in his yard undergoing repairs, or his possession for

that purpose; and the same possession is sufficient for a common-law lien. *The Schooner Marion*, 1 Story, 68, 75.

I do not think it requisite to determine in this case whether necessary repairs upon a domestic vessel in her home port can be made a lien or charge upon her as against the individual interest of an owner who gives express notice of dissent to the shipwright. Part owners of vessels are, for the most part, regarded as tenants in common of other chattels are regarded, neither of whom, at common law, can bind the others, or the others' interest in the property, except through their consent, expressed or implied. It seems to be settled that a part owner of a vessel who has not authorized repairs is not personally liable for any part of the expense incurred therefor by the direction of the other part owners. *Stedman v. Fiedler*, 20 N. Y. 437; *Brodie v. Howard*, 17 C. B. 109. The common law affords no remedy to one tenant in common of a single indivisible chattel against another part owner who retains it to his own exclusive use. *Russell v. Allen*, 13 N. Y. 173; *Gilbert v. Dickerson*, 7 Wend. 449. He is, therefore, not liable for any part of the expense of keeping and repairing it while in the possession and use of the other part owner; nor does the latter have any lien for his charges and expenses. 1 Pars. Shipp. & Adm. 115. Only in case of a destruction of the property or a sale or secret removal of it by one part owner, the other may, at his option, recover in trover the value of his interest as for a conversion; or, at his election, he may treat the vendee as only a co-tenant with himself, and retake and use the property himself, if he can get it, with equal exemption from any liability to account for its use. *Wilson v. Reed*, 3 Johns. 175; *Hyde v. Stone*, 9 Cow. 230; *White v. Osborne*, 21 Wend. 72; *Fiero v. Betts*, 2 Barb. 633; *Tyler v. Taylor*, 8 Barb. 585; *Dain v. Cowing*, 22 Me. 347.

These rude and semi-barbarous incidents of the common law in regard to co-tenants of chattels have necessarily been much modified to meet the exigencies of commerce and the equitable rights of part owners of vessels. A managing owner, or a ship's husband, has a general implied authority to bind all the owners for necessary repairs, unless the party dealing with them have notice of dissent, (Story, Ag. § 40;) and in this country it may be deemed settled that necessary repairs or supplies furnished on the order of any one part owner will be deemed to have been furnished upon the implied authority of all the part owners, and all will be bound therefor, unless express dissent is proved, (3 Kent, Comm. *155; *McCready v. Thorn*,

51 N. Y. 454; 1 Pars. Shipp. & Adm. 101;) and any circumstances which can be seized upon as importing or involving any ratification by the other owners of the work or supplies previously furnished upon the order of one, will also make the others liable; such as participating in subsequent profits of the voyage, or taking a bond for the return of the vessel in an amount including the value of the repairs, (*Davis v. Johnson*, 4 Sim. 539, 543;) otherwise, if the amount of the bond does not include such repairs, (*Brodie v. Howard*, 17 C. B. 109.)

If repairs are absolutely necessary to a voyage the majority in interest may cause them to be made; and if the other owners dissent, they cannot share in the future earnings of the ship without allowing for the expense of the repairs, although their value is not exhausted in the voyage. *Green v. Briggs*, 6 Hare, 395; *Maclac*. Shipp. 105. Thus, except in case of the loss of the vessel, dissentient part owners are practically compelled ultimately either to contribute to necessary repairs or else to abandon their interest in the use of the vessel to the other part owners.

There is no question, however, that the implied authority to bind other part owners does not extend beyond necessary and reasonable repairs, (1 Pars. Shipp. & Adm. 100;) and in this case the lengthening and substantial rebuilding of the *Two Marys* was in excess of any authority which could be implied as against other owners even in a ship's husband or master, or a managing owner; and as *Wheaton*, the owner of one-sixteenth, gave written notice of his dissent to the repairs, which I think is sufficiently proved to have come to *Hawkins'* knowledge, and as that dissent has never been waived, and the repairs were beyond the limit of any reasonable necessity, *Wheaton's* interest cannot be here considered as in any manner bound by *Hawkins'* claim.

But I do not perceive anything either incongruous in itself, or impracticable in its results, in holding that a common-law lien might be created upon the shares of the libellant and *Crowley*, the owners of fifteen-sixteenths, who authorized the repairs to be made. As they might sell their interests separately and deliver possession of the vessel, so they might equally create any charge upon their interests recognizable by law. They could mortgage their shares and deliver possession to the mortgagee; and they might employ *Hawkins* to repair, and deliver possession of the vessel to him for that purpose in the ordinary way, so as to create a lien valid in my judgment against

their own shares, at least, if their authority extended no further. In doing so they would give Hawkins the same possessory rights which they themselves had, and no more; and they would thereby authorize the court, through the medium of any appropriate legal proceedings, to make as effective a sale of their own shares for the purpose of satisfying the lien as they themselves might have made directly. The point was involved, though not discussed, in the case of *The Mary E. Perew*, 15 Blatchf. 58. Although a mere common-law lien is a right of detention only, and does not admit of any enforcement by means of a private sale, or by a suit in equity for that purpose, (*MacLac. Shipp.* 7; *Thames Iron-works, etc., v. Patent Derrick Co.* 1 J. & H. 93; *Terrell v. Schooner B. F. Woolsey*, 4 FED. REP. 552, 558,) yet it has been held enforceable under the general powers of a court of admiralty, as well as under the enlarged remedy designed to be afforded under the statute of this state passed May 8, 1869, (Laws of N. Y. 1869, c. 738, p. 1785.) *The Marion*, 1 Story, 68; *The Bark Archer*, 9 Ben. 455; *The B. F. Woolsey*, 7 FED. REP. 108, 116.

But even if it were otherwise, and if Hawkins had no means of enforcing his possessory lien by sale through a suit in admiralty, that would not prevent his intervention as a lienor upon such a lien on a libel filed by another upon which the marshal had under process taken the vessel from his possession. Such possession, if lawfully held by Hawkins at the time the vessel was arrested by the marshal, this court, in enforcing the rights of the libellant, is bound to respect, by admitting him to present his claim and have it paid, if he shall be found legally entitled to payment, to the extent of the value of his employers' shares; just as it would do in the case of a mortgagee of one or more shares, who, though he could not directly sue in admiralty, would be admitted, nevertheless, to intervene and set up his claim upon the *res* when it was libelled at the suit of another. *The Jenny Lind*, 3 Blatchf. 513; *The Island City*, 1 Low. 375, 379; *The Gustaf*, 1 Lush. 506; *The Old Concord*, 1 Brown, Adm. 270; *The St. Joseph*, Id. 202; *The Brig Wexford*, 7 FED. REP. 674, 684.

There is nothing in the nature of the contract between the libellant and Hawkins incompatible with the ordinary lien of a mechanic for the work done by him. There was no agreement that Hawkins should be paid in goods exclusively, although it is true that mutual dealings and credits between them arose to a considerable extent. In several of the libellant's letters, where payment in money is re-

ferred to, there is no claim that Hawkins was not entitled to money, or that he was to take his pay in goods. The passages in the testimony referring to Hawkins' statements that he was doing the work on the credit of McLean, evidently refer only to the person from whom he would take his orders and directions concerning the repairs to be made on the vessel; they were obviously not made with reference to any question of lien, nor were they designed to express any waiver of whatever lien the law might give him. McLean testifies that nothing was ever said between them upon the subject of a lien. Unless something is said or done incompatible with it a lien exists as a matter of course; it is the ordinary right of the mechanic; and it existed in this case upon McLean's interest, unless the vessel was voluntarily surrendered and the lien thereby waived.

The burden of proof is undoubtedly upon the libellant to show that Hawkins waived his lien. Every presumption is to the contrary. To divest his lien, in the language of Judge Story, (*The Marion*, 1 Story, 76,) incontestible proof of an intention to surrender the vessel to the owners must appear, through the language or the acts of one or both of the parties, plainly incompatible with the continuance of the lien. I am not satisfied that the evidence in this case shows any such intended surrender or waiver by Hawkins, or that the libellant or Capt. Crowley ever so understood.

I have already stated that Hawkins' possession of the vessel, while she was in his yard undergoing repairs, was a sufficient possession to found a claim of lien upon, notwithstanding the presence of Lawrence, the mate, in the pay of McLean, and the occasional presence of Capt. Crowley. The vessel was launched on the twenty-sixth of August. McLean, Capt. Crowley, and various other persons were aboard at the time, and participated in the festivities of the occasion. It cannot be seriously claimed that this amounted to any surrender of the vessel. The launch was the ordinary incident of that stage of the work. The work was unfinished, and was continued daily by Hawkins until the thirteenth of September. Upon being launched she was moored at a dock adjacent to the ship-yard which Hawkins had the use of. He slept in her that night. The next day, fearing a storm, in order to prevent her from chafing at the dock, he ordered her to be hauled out into the stream, where she lay until the sixteenth of September, when she was arrested and carried away by the marshal. She was still incomplete; her center-board was not in, nor her fore-castle fin-

ished. During this time Lawrence usually slept on board the schooner as she lay in the stream, as he had done when she was on the ways. Capt. Crowley and his son were also more or less aboard. On several occasions, however, when Capt. Crowley had undertaken some interference, he had been ordered by Hawkins to desist, and he was forbidden to go aboard the vessel if he undertook any interference. Crowley swears that after she was launched Hawkins put her in his possession. Hawkins denies it; he swears that he never surrendered her. Hawkins' account of the matter is, I think, clearly sustained by the letter of McLean, written September 10, 1879, in which he says: "Please be sure and bring her [the schooner] down to-day or to-morrow, and bring your bill with you. It is too bad to keep her lying still now. You need not be afraid of your money; you can have security for every dollar that is due you." This letter, written two weeks after the launch, with the urgent request to bring the vessel down to the city, with his bill, and the assurance that Hawkins would have security for every dollar that was due him, furnishes to my mind conclusive evidence that the parties all understood that the vessel was still in Hawkins' possession and under his control, as much so as when lying on the ways in his yard; and that they knew that Hawkins looked to the possession of her as a security for his claim. Except for this, there was no reason why McLean should assure him that he should have security upon bringing the vessel down. Nor even aside from his letter should I be disposed to hold that Hawkins' possessory lien was lost at the time of the seizure by the marshal. The vessel lay in the stream, immediately adjacent to his yard. She was placed there by his direction in the ordinary course of completing the repairs which he was employed to make; the repairs were not completed, and Lawrence's presence was not different from his presence at the yard; and the presence of Capt. Crowley and his son, more or less, was evidently by the sufferance of Hawkins only, and with no intention of surrendering the vessel to their control, or waiving his possessory rights. His possession was a continuance of that which he had previously held in the yard, for the purpose of completing the work upon which he was engaged. The presence of the other persons on board was not incompatible with it, and therefore did not change or determine Hawkins' previous possession, unless it were so understood and intended. That McLean did not so understand is plain from his letter above quoted. When

the marshal came to arrest her, Hawkins forbade the arrest, claiming to be in possession. In truth, no reason whatever appears for the sudden issuing of this new process to arrest the vessel upon the old libel, filed nearly eight months before, except to wrest her by force from the known possession of Hawkins, after he had failed to bring her to the city as requested, six days before, upon McLean's promise to give security for his payment. Had this offer of security been made in good faith it seems hardly probable that a litigation of two years and a half would have arisen upon the mere question of Hawkins' right to intervene and present his claim to the court, without any endeavor, in the mean time, even to adjust their accounts.

Upon the whole evidence I am of opinion that Hawkins, at the time of the arrest of the vessel, had such a possessory lien as should be recognized and protected in admiralty; that it had not been waived, and that he must therefore be admitted to intervene as a claimant; and the exceptions are therefore overruled.

See *The De Smet*, *ante*, 483, and note.

END OF CASES IN VOL. 10